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NO 83-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JOHN E. WHITE,

Appellant,

vs.

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION; R.H. WARREN, Chairman, Dougherty County Board of Education; MORGAN MURPHY; CHALRES L. NESBITT; FRANKLIN U. CROSS; MRS. CALISTA LANGSTAFF; JAMES H. HALL; MRS. LAURA TRIPLETT, Members of the Dougherty County Board of Education; PAUL ROBERTSON, Superintendant, Dougherty County School System, individually and in their official capacities,

Appellees.

ON APPEAL FROM THE
THREE JUDGE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

JOHN R. MYER
1515 Healey Bldg.
Atlanta, Georgia 30303
404-522-1934

ATTORNEY OF RECORD
FOR APPELLANT

81PP

QUESTION PRESENTED

Whether Section 5 of the Voting Rights Act of 1965 applies where a covered entity which had no policy concerning political leaves in 1964, maintained a continuous policy of permitting such leaves during the period from 1972 until 1980, and since 1980 has not permitted such political leaves?

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OPINION BELOW

The three judge District Court opinion below is reported at 579 F.Supp. 480 (M.D.Ga. 1984).

JURISDICTION OF THE COURT

This is an appeal from a decision and judgment of a three-judge District Court convened pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973c and 28 U.S.C. Section 2284. The judgment sought to be reviewed was entered February 13, 1984, based upon a final decision entered February 10, 1984. The district court denied a motion to alter or amend by order entered on March 1, 1984. The notice of appeal was filed in the United States District Court for the Middle District of Georgia on March 14, 1984.

Jurisdiction of this appeal is conferred on this Court by 42 U.S.C. Section 1973c and 28 U.S.C. Section 1253.

STATUTORY PROVISION INVOLVED

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c provides:

> Whenever a State or political subdivision with respect to which the prohibition set forth in section 1973(a) of this title based upon determinations made under the first sentence of section 1973(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973(a) of this title based upon determination made under the second sentence of section 1973(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisites to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibition set forth in section

1973(a) of this title based upon determination made under the third sentence of section 1973(b) of this title based upon determinations made under the third sentence of section 1973(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or

upon good cause shown to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

STATEMENT OF THE CASE

This appeal represents the second appearance of these parties before this Court. In Dougherty County Board of Education, et al. v. White, 439 U.S. 32 (1978), ("White I"), this Court held that the Rule 58 of the appellee Board of Education which required appellant to take a political leave of absence to run for elective office was covered by Section 5 of the Voting Rights Act of 1965, as amended, and that such rule could not be enforced until such time as it had been "pre-cleared" as required by Section 5.

The underlying relationship between the parties remains the same as it was in White I. Appellant John White has continued to be employed by the Dougherty County Board of Education as an Assistant Coordinator of Student Personnel Activities, a nonteach-

ing, twelve-month employment position.[1] White has also continued to be re-elected to the House of Representatives in the Georgia General Assembly since this Court's decision in White I. The relevant facts, which are largely undisputed, occurred after this Court's decision in White I are as follows:

---

[1]As an Assistant Coordinator of Student Personnel Services at the Albany Area Vocational Technical School, White's responsibilities include admissions, records, counselling, and testing of students enrolled in the school system's vocational program. His workday Monday through Thursday begins at 2:30 p.m. and ends at 10:30, except on Tuesday when it ends at 9:30 p.m. On Friday, White's workday is from 8:00 a.m. until 4:00 p.m. His employment contract is on a twelve-month basis, and inter alia, provides that his "annual salary shall be subject to an adjustment on a prorata basis for the number of days the employee does not work. . .due to. . .employee's absence when there is no acumulative leave to cover such absence."

In November, 1978, White was re-elected to the Georgia General Assembly at the General Election held that year. After his re-election, White requested of the appellee Board that he be allowed to be absent without pay during the 1979 and 1980 legislative sessions.[2] At the November 20, 1978 meeting of appellee Board, the following action was taken:

> After some discussion of the matter, Mr. Sumpter made a motion, which was seconded by Mr., Murphy, that the Board reaffirm its position concerning employees fulfilling their contracts in their entirety.
>
> The Board so directed the Superintendent to notify Mr. John White, Mrs. Lillian Parkman and Mr. Don Cutler,

---

[2]Pursuant to the previous Rule 58, White had been permited to take such unpaid political leave for service in the Georgia General Assembly in the years 1975, 1976, 1977, and 1978. The Georgia General Assembly sits, in Atlanta, for forty legislative days each year during the months of January, February, and March.

> the three school employees elected to political offices, of the Board's decision.

These three employees appeared at the meeting of December 20, 1978 of the appellee Board. The minutes reflect that White was advised that if his request for political leave without pay to serve in Atlanta during the upcoming legislative session was granted, a study of the effect ofsuch leave on his job performance would be made over the next two years and the question would be reconsidered in light of that study. The Board then voted to allow White political leave without pay to serve in the Georgia General Assembly. In December, 1978, the appellee School Superintendent Robertson approved an administrative policy regarding political leaves of absence, which required, among other things, at

least three days' prior notice of a request for leave. White served in the 1979 and 1980 Sessions of the Georgia General Assembly on political leave without pay.

Following the 1980 Legislative Session, the appellee Board again considered the question of political leave. The official minutes of the April 15, 1980 Board Meeting report the following decision:

> The question of granting leaves of absence for political purposes was brought before the Board. Following discussion concerning the question, Mr. Murphy moved that no leaves of absence be granted to personnel of the Dougherty County School System for political purposes. Mr. Hall seconded the motion and the same was approved by a vote of five to one.

White was notified in writing of this decision by a letter dated April 22, 1980 from Superintendent Robertson which stated that

> "The Dougherty County Board of Education has decided that the Dougherty County School System will not grant any leaves of absence to its personnel for political purposes."

In November, 1980, White requested that the Board grant him political leave of absence without pay to serve in the upcoming 1981 Session of the Georgia General Assembly. On December 15, 1980, appellee Board denied White's request.

By letter dated December 31, 1980, White's attorney sent a letter to the attorney for the school board setting forth White's position that the denial of political leave without pay is a current policy which is unenforceable until such

time as Section 5 preclearance had been obtained. The appellee Board's attorney held the opposite view. White's attorney then contacted the Civil Rights Division of the Department of Justice with respect to the matter, and by letter dated February 11, 1981, the Department of Justice advised the Board's attorney that "It has come to our attention that the Dougherty County Board of Education may have changed its policy on political leaves of ab- sence for employees of the school system." That letter also indicated that this "possible change" had not been submitted for pre-clearance as required by Section 5. By letter dated February 18, 1981, the Board's attorney advised the Department of Justice that it had no policy regarding political leaves of absence and therefore declined to submit any matters for preclearance. By letter dated April 23, 1981, the Department of Justice responded to the Board

attorney's February 18, 1981 letter. That Justice Department letter stated in part as follows:

> Although you state that the Dougherty County School System has had no policy regarding political leaves of absence for its employees, information coming to our attention suggests that a change within the meaning of Section 5 may have occurred. For example, an article in the Albany Herald on Wednesday, April 23, 1980, stated that "The Dougherty County Board of Education voted five to one not to grant any 'leave of absence to its personnel for political purposes'." Previously, it is our understanding that the Board granted unpaid leaves of absence; thus, it is our opinion that a change in procedure has taken place.

By letter dated April 27, 1981, the Board's attorney replied to the Department of Justice that he did not believe any present policies of the Board of Education were covered by Section 5. The Department of Justice replied once again by letter dated June 30, 1981. That Department of Justice letter stated in part as follows:

> . . .For the reasons stated in our letters to you of February 11, 1981, and April

> 23, 1981, we continue to believe that the changes in the board's treatment of political leave requests is subject to preclearance requirements of Section 5. Thus, we again request that you submit for Section 5 review the board's standards, practices and procedures regarding the granting of leave for political purposes.

In the meantime, White filed, on March 10, 1981, a lawsuit in the Middle District of Georgia alleging that the denial of unpaid political leaves of absence to him violated Section 5 of the Voting Rights Act of 1965 as amended. A three-judge district court, as required by Section 5, was also requested to be convened. Following discovery, White filed, on or about November 14, 1981, a Motion for Partial Summary Judgment. By an order entered on January 12, 1982, a single judge district court, the Honorable J. Robert Elliott, denied the motion. On or about March 2, 1982, White filed a Motion to Vacate Order of January 12, 1982 and Renewed Motion for Convening of a Three-Judge District Court. That motion

was denied by an order entered by a single judge district court on April 26, 1982. White then sought appellate review in the Eleventh Circuit Court of Appeals, by way of Petition for Writ of Mandamus, to review the denial of his request for a three-judge district court. Pursuant to the orders of the Eleventh Circuit entered on July 15, 1982 and December 20, 1982, that petition for Writ of Mandamus was granted. Subsequently, a three-judge district court, consisting of the Honorable R. Lanier Anderson, III, Circuit Judge, J. Robert Elliott, District Judge, and the Honorable Wilbur D. Owens, Jr., District Judge, was convened.

White served in the 1981 Session of the Georgia General Assembly without being permitted any unpaid political leave of absence. In order to attempt to perform his elective duties, during the session of the Georgia General Assembly White utilized his ten days of annual leave and three days of personal leave. In addition, White made

several round trips per week between Albany and Atlanta, Georgia, commonly leaving the Georgia General Assembly around noon in order to report for his work which generally commenced at 2:30 p.m. White served in a similar fashion during the 1982 Session of the Georgia General Assembly. He was re-elected to office at the 1982 General Election and served in a like fashion during the 1983 Session of the Georgia General Assembly.

In January, 1983, White again requested a political leave of absence which request was denied.

A hearing for the convened three-judge district court was held in August, 1983. By order entered February 10, 1984, the divided district court ruled for the defendants and against plaintiff. Circuit Judge R. Lanier Anderson, III dissented from the adverse ruling for plaintiff. Judgment on that order was entered on February 13, 1984. A timely motion, pursuant to Rule 59(e), Federal Rules of

Civil Procedure, was served and filed by plaintiff, which motion was denied, again by a divided two to one vote, on March 1, 1984. On March 14, 1984, White filed, in the District Court, his notice of appeal of the final judgment to this court.

THE QUESTION PRESENTED IS SUBSTANTIAL

This appeal from the three judge district court represents the second appearance of these parties in litigation involving Section 5 of the Voting Rights Act of 1965, as amended. Their first appearance was in Dougherty County Board of Education v. White, 439 U.S. 32 (1978) ("White I"). There, this Court held that the Rule 58, adopted 1972 by the Board of Education requiring political leaves of absence while employees ran for public office, constituted a covered change under Section 5 which was subject to the preclearance provisions of that statute. The issues presented in this appeal here involve actions taken by the Board of Education subsequent to this Court's ruling in White I.

As set forth in more detail in Appellant's Statement of the Case, these subsequent facts are undisputed. They can be briefly summarized as follows:

-On November 1, 1964, the defendant Board had no policy concerning political leaves of absence for elected employees.

-From June, 1972 until enjoined by the District Court's Order of April 27, 1977, the Board of Education had an express and written policy governing and allowing political leaves of absence. This Court affirmed that injunction.

-In December, 1977, the Board granted Appellant a political leave of absence to serve in the 1978 Session of the Georgia General Assembly.

-In December, 1978, the Board granted Appellant and two other employees political leaves of absence.

-In December, 1978, the Superintendent promulgated administrative rules and regulations regarding political leaves of absence.

-Appellant was granted a political leave of absence for service in the 1979 and 1980 Sessions of the Georgia General Assembly.

-In April, 1980, the Board considered the results of a two year study of the effects on employees of political leaves of absence.

-In April, 1980, the Board declared it to be the policy of the Dougherty County School System that there would be no political leaves of absence.

-Subsequent to April, 1980, the Board has granted no political leaves of absence.

-Even the majority opinion below agreed that since April, 1980, "it is thus the policy and practice of the defendant board of education to deny its employees requests

for leaves of absence without pay to attend to the duties of elective office and in so doing to require is employees holding elective office to abide by the same leave policies that are applicable to all employees." (A. 17)

Therefore, based upon these findings of fact in the majority opinion, it is undisputed that for an eight year period between June, 1972 and April, 1980, the Board by policy and practice permitted political leaves of absence. It is further undisputed that since April, 1980, the policy and practice of the defendant Board has been to deny employees political leaves of absence.

On the basis of these findings of fact, the majority opinion reached the legal conclusion that there was no "standard, practice or procedure" within the meaning of Section 5 which required preclearance:

> "Thus, the board's April, 1980 action constituted nothing more than its refusal to adopt a legislative leave policy and served in effect as a reaffirmation of its policy requiring employees to fulfill their contracts with the exception of time away from the job allowed to all." (A. 45)

The dissenting judge below, Circuit Judge R. Lanier Anderson, III, reached a contrary conclusion:

> The fact that the April 1980 decision was made as the result of the Superintendent's two-year study of the matter of political leaves of absence indicates that the policy was a new policy, and not merely a continuation of a prior case by case policy. (A. 63)

Appellant submits that the decision of Judge Anderson, not only in terms of its conclusions, but also in terms of its analysis of Section 5's requirements is the correct application of this Court's decisions construing that act.

There is no question that, on the facts of this case, the Board authorized by policy and practice political leaves of absence for the eight year period from 1972 until 1980. That evidence demonstrates that the decision in April, 1980 to deny future political leaves was a formal, considered and explicit decision of the defendant Board to end the eight year practice it had permitted. This undisputed evidence of an uninterrupted eight year period during which the Board as a matter of policy and practice authorized political leaves of absence further demonstrates that the action of the Board in April, 1980 was substantially more than a simple refusal to alter neutral policies and practices as the majority here concluded. While the defendant Board has a number of neutral policies and practices, it also

maintained for the eight year period policies and practices directly addressing the political process.

This appeal presents an important question of Section 5 law: does Section 5's preclearance requirements reach the situation presented here where a convered entity, after the adoption of the Voting Rights Act of 1965, permits political leaves for a period of eight years and then determines that it will no longer do so? Congress intended the Voting Rights Act to prevent covered entities from moving in a retrograde fashion with respect to activities encompassed within the Act. In this case, the Board of Education has moved from having no policy whatsoever concerning political leaves of absence in November, 1964, to permitting such political leaves for the

period of time between May, 1972 and April, 1980, and then denying all such leaves after April, 1980.

The majority decision below held that the set of circumstances did not implicate Section 5's requirements. That conclusion is contrary to this Court's ruling in Perkins v. Matthews, 400 U.S. 379 (1971). In that case, the Mississippi legislature had enacted a statute in 1962 which changed municipal elections from a ward to an at-large basis. The City of Canton, Mississippi, however, had conducted municipal elections in June, 1965 on the basis of wards rather than at-large. When Canton subsequently sought to implement the change to at-large elections, a Section 5 action was brought. The District Court there denied plaintiffs the requested relief in part because the 1962 statute antedated the Voting Rights Act of 1965 (and the benchmark

date of November 1, 1964), and held that it should have complied with the 1962 Statute. Id., at 386. This Court reversed.

In its reversal, this Court held that where there was any ambiguity about what standard, practice or procedure was "in effect" on November 1, 1964, a District Court in a Section 5 action was authorized and required to determine what procedure was in fact in effect on that date by construing the question with the "benefit of hindsight" provided by subsequent actions of governmental authorities. This Court in Perkins therefore concluded:

> "With the benefit of hindsight, however, we know that Canton elected its aldermen by wards in its June, 1965 municipal election. The record reflects no relevant change between November 1964 and June 1965 to suggest that a different procedure would have been in effect if the elections had been held seven months earlier. Consequently, we conclude that the procedure in fact 'in force or effect' in Canton on November 1, 1964 was to elect

> aldermen by wards. That sufficied to bring the 1969 change within §5." Id., at 395. (Emphasis added.)

This Court has subsequently reaffirmed this holding of Perkins. See, e.g., City of Lockhart v. United States, 103 S. Ct. 989, 1002, n. 7 (1983).

Appellant submits that, when applied to the facts in this case, this Perkins rule supports his position and warrants reversal. It is conceded by the majority below that on November 1, 1964, the defendant Board had no policy concerning political leaves of absence. That is, since the question had not arisen, the Board did not have a policy providing for such leaves and it did not have a policy prohibiting such leaves. The first time the question was posed was by the Appellant in May of 1972 when he announced his intention to qualify that June to run for political office. On June 10, 1972, the

defendant Board adopted Rule 58. Appellant submits that application of the Perkins rule results in the conclusion that if the question had been posed to the defendant Board prior to November, 1964, a Rule 58 adopting a formal policy would have been the result. As in Perkins, there is nothing in the record which would have suggested any factors different in 1964 (at which time the question had never been raised) and in 1972 (at which time the question was first raised). Accordingly, application of the Perkins rule results in a conclusion that had the question been posed prior to November 1, 1964, the Board would have adopted a policy permitting leaves (as it did with Rule 58 in 1972). If the procedure in effect "in fact" (under the Perkins rule) would have been a formal political leave

policy, then the decision in April, 1980 to abandon such policy is all the more a covered change.

The erroneous analysis of the majority decision below extends beyond failure to adhere to Perkins. As the dissent points out in detail, the majority's opinion is also inconsistent with the Section 5 principles applied by this Court in White I. The majority opinion ignores the expansive interpretation which this Court had held should govern the application of Section 5. See White I, supra at 39. The majority opinion appears to have relied in part of its own evaluation of the substantive merits of whether the Board's policies or practices would violate Section 5. See A.16. This inquiry has been repeatedly prohibited by the decisions of this Court, as point out in the dissenting opinion, (A., n.1). The only three judge district court with the

authority to make these determinations, or rely upon them, is a three judge district court in the District of Columbia. The Section 5 jurisdiction of the Court below was limited only to the questions of Section 5 coverage.

The majority opinion below is also inconsistent with the holding of White I that the Section 5 interpretation of the Attorney General is entitled to great deference. White I, supra, at 39-40. The record in this case clearly establishes that on three separate occasions, the Attorney General requested the Board to submit its 1980 leave policies for preclearance. Yet, the majority opinion, (A. 15), cites only the first of these three requests. The dissenting opinion sets forth the subsequent request of the Attorney General following the initial Board responses of not submitting the changes in polices or practices. (A. 70).

With the benefit of two responses from counsel for the Board the Attorney General expressed his view that the changes at issue here were subject to Section 5 preclearance. The interpretation of the Attorney General was entitled to the deference which the dissenting opinion would have granted to it.

Because the majority decision below fails to adhere to the principals established by this Court in its interpretation of Section 5, the decision below should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment and opinion of the three judge District Court below. Based upon the dissenting opinion of Judge Anderson, Appellant submits that this

appeal is appropriate for summary reversal. Alternatively, the Court should schedule the case for full review and consideration.

S/JOHN R. MYER

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

JOHN E. WHITE,	)	CIVIL ACTION
Plaintiff,	)	NO. 81-20-ALB
vs.	)	
DOUGHERTY COUNTY BOARD OF EDUCATION, et al.,	)	
Defendants.	)	

Before ANDERSON, Circuit Judge, OWENS, District Judge, and ELLIOTT, District Judge.

OWENS, District Judge:

In 1976 plaintiff, John E. White, a black Albany, Georgia citizen and employee of the Dougherty County Board of Education filed a previous complaint (Civil 76-29 Albany Division) in this court alleging that defendant board of education's Rule 58 requiring any school system employee who

becomes a candidate for public office to take a leave of absence without pay for the durtion of his candidacy, was violative of the Voting Rights Act; the Voting Rights Act had not been complied with; and use of the rule should be enjoined by a three-judge court until the Voting Rights Act was complied with. By order dated March 27, 1977, the required three-judge court agreed with plaintiff White and in a written opinion published in 431 F. Supp. 919 enjoined the use of Rule 58 until the Voting Rights Act was complied with. Defendant Dougherty County Board of Education appealed to the Supreme Court of the Unied States and the Supreme Court on November 28, 1978, in a 5-4 decision affirmed. 439 U.S. 32, 58 L.Ed.2d 269, 90 S. Ct. 368.

On March 10, 1981, plaintiff John E. White filed the subject complaint against

the Dougherty County Board of Education alleging that on or about April 15, 1980, the board of education, after abolishing the rule that was enjoined, adopted a new political leaves of absence policy which expressly denies employee leaves of absence for political purposes; that said policy violates the Voting Rights Act; the Voting Rights Act has not been complied with. A court of three judges should enjoin use of the policy until the Act is complied with. A court of three judges was designated, and a hearing was held. All having been considered, this constitutes the court's ruling on all issues required to be decided by a court of three judges. 42 U.S.C. 1971(g). [Sic]

The Facts

This being a continuation of the events that precipiated plaintiff's first lawsuit, the facts begin with those events.

They were stipulated to and, as stipulated, set forth in the court's order of March 27, 1977, to-wit:

> [T]he plaintiff John E. White, a black citizen of Dougherty County, Georgia, filed his complaint alleging that in May 1972 while employed by the Dougherty County Board of Education, he publicly announced his intention to become a candidate for a seat in the House of Representatives of the General Assembly of Georgia. Plaintiff White states that he thus became the first black in recent years to seek election in Dougherty County as a Representative to the General Assembly. In June, 1972 the defendant Dougherty County Board of Education for the first time adopted the following policy known as Rule 58:
>
> > 'POLITICAL OFFICE. Any employee of the school system who becomes a candidate for any elective political office, will be required to take a leave of absence, without pay, such leave becoming effective upon the qualifying for each elective office and continuing for the duration of such political activity, and during the period of service in such office, if elected thereto.'
>
> As required by this rule the plaintiff took a leave of absence without pay from the time of his qualification as a Democratic primary candidate in June, 1972 until his defeat in the Democratic primary election in August, 1972. In June 1974 he again qualified to run for

the same office and was required to take a leave of absence from his employmnet on June 12, through and including his winning the August 1974 primary election and the November 1974 general election. Following the general election of November 5 he was reinstated in his employment on November 18, 1974. The court has not been advised whether or not he had opposition in the general election. On June 8, 1976, he again qualified to run for the same office and was required to take a leave of absence without pay through and including the August, 1976 Democratic primary election. He won that election, did not have opposition in the general election, and was reinstated to his employment on September 8, 1976, preceding the November general election. Plaintiff's affidavit shows that as a result of these leaves of absence without pay, he was deprived of the following amounts of monetary compensation:

1972	$2,810.00
1973	4,780.00
1976	3,750.00

Rule 58 has not been submitted for United States District Court for the District of Columbia judicial approval or to the Attorney General for him to have the opportunity to disapprove, all pursuant to Section Five. . . .

431 F. Supp. at 921.

Additional Facts as Found by this Court

John White is, and for 17 years has been, employed as an Assistant Coordinator of Student Personnel Services at the Albany Area Vocational Technical School. The vocational school operates during the day and even throughout the entire year. Mr. White's responsibilities include admissions, records, counseling, and testing, and require him to be on the job throughout theentire year. His workday Monday through Thursday begins at 2:30 p.m. and ends at 10:30 p.m., except on Tuesday when it ends at 9:30 p.m. On Friday he works from 8:00 a.m. to 4:00 p.m.
His employment contract is a twelve-month contract and, among other things, provides that his "annual salary shall be subject to an adjustment on a pro-rata basis for the

number of days the employee does not work. . .due to employee's absence when there is no accumulative leave to cover such absence."(Def. Ex. 5).

Before, during, and after the time that Rule 58 was in effect the Dougherty County Board of Education, as a matter of policy applicable to all employees, permitted each employee during the year to be absent from the job without loss of compensation for vacation, sickness, and other reasons. As of April 15, 1980, the date requests for political leave without pay were denied, that policy allowed all employees to be absent with pay for the following:

(a) Jury duty -*[1]

(b) Vacation - ten days

---

[1] Since this controversy does not involve either jury duty, sick, military, or maternity leave, the details are irrelevant and omitted.

(c) Personal leave - three days

(d) Sick leave -*1

(e) Military leave -*1

(f) Maternity leave -*1

Further use of Rule 58 was enjoined by this Court on March 27, 1977. The defendant board appealed to the Supreme Court of the United States but also rescinded the rule on April 11, 1977. Mr. White thereafter requested and the defendant board of education granted a leave of absence without pay for the time Mr. White was required to be in Atlanta attending the 1978 session of the Georgia General Assembly - 40 days during January, February, and March. This leave of absence had no effect upon his normal leaves of absence with pay.

In the November, 1978, general election Mr. White was re-elected. Earlier that

year the board of education had adopted a policy which stated:

> WORK SCHEDULE
>
> It shall be the policy of the Dougherty County School Board that each employee fulfill his/her contract in its entirety. That is, each ten (10) month employee shall fulfill his/her contract during the regular academic school year (August-June).
>
> Because an eleven (11) month contract can not be completed in its entirety during the regular academic school year an agreement between the employee and the Superintendent will determine when the additional month will be completed.
>
> Twelve (12) month employees will be expectded to work the entire twelve months except for vacation time.
>
> Approved 1978

(Def. Ex. 11).

In response to Mr. White's request that he be allowed to be absent without pay during the 1979 and 1980 legislative sessions the defendant board met on November 20, 1978, and took the following action:

After some discussion of the matter, Mr. Sumter made a motion, which was seconded by Mr. Murphy that the Board reaffirm its position concerning employees fulfilling their contracts in their entirety.

The Board so directed the Superintendent to notify Mr. John White, Mrs. Lillian Parkman[2/] and Mr. Don Cutler.[3/] the three school employees elected to political offices, of the Board's decision. (footnotes added)

(Def. Ex. 1).

As directed, Superintendent Robertson notified Mr. White and also advised him, Mrs. Parkman, and Mr. Cutler that the board desired to meet with them and discuss the

---

[2/] Mrs. Parkman was also an elected State Representative.

[3/] Mr. Cutler was an elected County Commissioner.

question of how they each could perform their board of education job responsibilities and also serve in their elected offices. On December 20, 1978, that meeting was held. Mr. White was advised that if his request for leave without pay to serve in Atlanta during the upcoming legislative session was granted, a study of the effect of such leave on his job performance would be made over the next two years, and the question would be reconsidered in light of that study. After a great deal of discussion the board, by a four to three vote, allowed leave without pay. (Pl. Ex. 7). The Superintendent then promulgated administrative regulations requiring at least three days notice of a request for leave and approval thereof in advance. (Pl. Ex. 1).

Following the conclusion of the 1980 legislative session the board met on April

15, 1980, and, as promised, again discussed the question of leaves of absence without pay for political purposes. Superintendent Robertson reported that the two-year study showed that the leave without pay policy was having an adverse or harmful effect upon Mr. White's job performance and recommended that further leave without pay for political purposes be denied. By a vote of five to one the Superintendent's recommendation was adopted.

Mr. White served in the general assembly using personal leave and vacation time to account for his absences from the job and limiting his appearances in the legislature to the most essential portions of the forty-day session.

On November 26, 1980, Mr. White again requested leave without pay to serve from January 12 to March 6, 1981, in the Georgia General Assembly. On December 15, 1980,

the defendant board, "after a discussion of the effect of his absences from his position at the Albany Area Vocational Technical School, voted to deny his request. . . ." (Pl. Ex. 6).

On December 31, 1980, plaintiff's attorney re-entered the picture and contended by letter that the board's denial of Mr. White's leave without pay is a current policy that is unenforceable until Section 5 clearance has been obtained. The defendant board's attorney was of the opposite view.

Plaintiff's attorney contacted the Civil Rights Division of the Department of Justice and by letter dated February 11, 1981, the Chief of the Voting Section advised defendant's attorney:

> It has come to our attention that the Dougherty County Board of Education may have changed its policy on political leaves of absence for employees of the school system.

> Our records fail to show that this possible change affecting voting has been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act of 1965, as amended. It is necessary that a change either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that the change does not have the purpose and will not have the effect of discriminating on account of race, color or membership in language minority group. Changes in procedure which affect voting are unenforceable unless and until the Section 5 preclearance requirements have been met.
>
> Should you elect to submit this apparent change to the Attorney General, please follow the procedures set forth in the enclosed Procedures for Administration of Section 5. In addition, please provide us with a description of the practices or policies which have been in effect concerning granting, or not granting, leaves of absence, with or without pay, etc., since November 1, 1964, for political activity by employees of the Board of Education. (emphasis added).
>
> * * *

(Pl. Ex. 10).

By letter dated February 18, 1981, defendant board's attorney advised the

Civil Rights Division of the Department of Justice:

> The Dougherty County Board of Education has no policy on political leaves of absence for employees of the school system. Personnel who are under contract with the Dougherty County School System are expected to fulfill their contracts and give to the school system their full attention and energies. This applies to all contract personnel.
>
> The Dougherty County School System did have a rule at one time pertaining to leaves of absence for political candidates. However, the Supreme Court for the United States in the case of Dougherty County Board of Education v. White, 439 U.S. 32, 58 L.Ed. 269, 99 S. Ct. 368 (1978), held that such rule was in violation of Section 5 of the Voting Rights Act of 1965. Since and prior to that date the Dougherty County School System has had no policy regarding political leaves of absence for employees of the school system. All employees are dealt with in the same fashion concerning leaves of absence.

On March 10, 1981, this second complaint was filed. Thereafter the attorneys continued to assert their respective contentions by letters, responsive pleadings, and argument - oral and written

- to this court of three judges convened pursuant to the Voting Rights Act and 28 U.S.C. §2284.

Mr. White, at each general election has been re-elected as a state representative. By using his personal and vacation leave with pay time he has continued to serve in his elected office and to be a full-time employee of the defendant board of education. The defendant board of education has continued to refuse to grant Mr. White leave without pay during the annual 40-day legislative session in effect requiring him to abide by the personnel leave policiess applicable to him in common with all other employees.

If Mr. White were permitted leave without pay, he estimates he would be absent from his job approximately 45 school days each year. The area vocational school is in session approximately 208 days each year. Not counting leave with pay time, Mr., White would thus be absent some 45 of

208 days - approximately 21% of the work year. Counting leave with pay time of a minimum of 10 days vacation plus three days personal leave, Mr. White would be absent some 58 of 208 days - approximately 28% of the work year.

The defendant board is requiring all employees to abide by its leave with pay policies. Although its stated intention is to deny all future requests for political leave, the board urges that its practice is to consider requests for leave for other purposes, including political leave, on a case-by-case basis. As a practical matter, all Mr. White's requests for leave without pay to attend to the duties of an elective office have been denied. It is thus the policy and practice of the defendant board of education to deny its employees requests for leaves of absence without pay to attend to the duties of elective office and in so doing to require its employees holding elective office to abide by the same leave

policies that are applicable to all employees.

The Law

As the three-judge court that decided the parties' first controversy stated:

> In 1965 Congress enacted the Voting Rights Act to eliminate the racial discrimination in voting that Congress believed to still exist in a minority of the states of these United States, chiefly those in the traditional South. As contemplated, only eleven states were brought within coverage of the Act - South Carolna, Alabama, Alaska, Georgia, Louisiana, Mississippi, Virginia, twenty-six counties in North Carolina, three counties in Arizona, one county in Hawaii, and one county in Idaho. South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966).
>
> Section Five of the Act, 42 U.S.C.A. ¶1973c, provides that whenever a covered state or political subdivision 'shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964. . .' it may not utilize or implement such change until (a) it has secured a judicial determination in the U.S. District Court for the District of Columbia that the change does not have the purpose or effect of denying the right to vote on account of race or (b)

it has submitted such change to the Attorney General of the United States and the Attorney General has not interposed an objection within sixty days. While the Act does not specifically provide for a remedy for failure to comply with Section Five, the Supreme Court has held that a complaint for injunctive relief to be heard by a district court of three judges may be filed in any U.S. District Court and that court if it is shown that Section Five applies must enjoin the utilization or implementation of such change until Section Five is complied with. Allen v. Board of Elections, 398 U.S. 544. 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).

* * *

This district court of three judges is required to resolve any dispute as to the coverage of Section Five or, said more directly, to determine 'whether such changes have the potential for diluting the value of the Negro vote and are within the definitional terms of §5.' Georgia v. United States, 411 U.S. 526, 534, 93 S.Ct. 1702, 1707, 36 L.Ed. 2d 472, 481 (1973). The question of coverage to be decided by this court does not include the ultimate question required by Section Five to be presented to the District Court for the District of Columbia or the Attorney General, i.e., whether or not the enactment in truth and fact has a discriminatory purpose of effect. Perkins v. Matthews, 400 U.S.

I

As originally enacted, the law was to apply 'in any State or in any political

> subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 percentum of the persons of voting age residing therein were registered on November 1, 1964, or that less tdhan 50 percentum of such persons voted in the presidential election of November, 1964.'42 U.S.C.A. Sec. 1973b(b).
> The appropriate determinations subjecting Georgia and its political subdivisions to the Act were made on August 6, 1965, and published in the Federal Register on August 7, 1965. 30 Fed.Reg. 9897.

431 F. Supp. at 920-22.

In its decision of the parties prior case the Supreme Court set forth its view of the coverage of Section Five:

> Section 5 provides that whenever a covered State or political subdivision 'shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force o effect on November 1, 1964' it may not implement tht change until it either secured a determination from the District Court for the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging, the right to vote on account of race or color' or submits the change

to the Attorney General and he interposes no objection within 60 days. [42 USCS §1937c]
(emphasis added). Although §14(c)(1) expansively defines the term 'voting' to include all action necessary to make a vote effective,' 78 Stat. 445, 42 U.S.C. ¶1973(c)(1) [42 USCS §1973(c)(1), the act itself nowhere amplifies the meaning of the phrase 'standard, practice, or procedure with respect to voting.' Accordingly, in our previous constructions of §5, we have sought guidance from the history and purpose of the Act.

A

This Court first considered the scope of the critical language of §5 in Allen v. State Board of Elections, 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817 (1969), involving consolidated appeals in three cases from Mississippi and one from Virginia. After
canvassing the legislstive history of the Act, we concludeddd that Congress meant 'to reach any state enactment which altereddd the election law of a covered State in even aminor way.' 393 U.S. at 566, 22L.Ed.2d 1,
89 S.Ct. 817. Conceived after 'nearly a century of systematic resistance to the Fifteenth Amendment,' South Carolina v. Katzenbach, 383 U.S. 301, 328, 15 L.Ed. 769, 86 S.Ct. 803 (1966), the Voting Rights Act was, as Allen emphasized, 'aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race.' 393 U.S. at 565, 22 L.Ed.2d 1, 89 S.Ct. 817 (footnote omitted).

To effectuate the 'articulated purposes of the legislation' Id., at 570, 22 L.Ed.2d 1, 89 S.Ct. 817, the Allen Court held that the phrase "standard, practice, or procedure' must be given the 'broadest possible scope,' Id., at 567, 22 L.Ed.2d 1, 89 S.Ct. 817, and construed it to encompass candidate qualification requirements. Id., at 570, 22 L.Ed.2d 1, 89 S.Ct. 817 (Whitley v. Williams, companion case decided with Allen, supra). The Court concluded that any enactment which burdens an independent candidate by "increeasing the difficulty for [him] to gain a position on the general election ballot' is subject to §5 since such ameasure could 'undermine the effectiveness' of voters who wish to elect to non-affiliated representatrives. Ibid.

In subsequent cases interpreting §5, we have consistently adhered to the principles of broad construction set forth in Allen. In Hadnott v. Amos, 394 U.S. 358, 22 L.Ed.2d 336, 89 S.Ct. 1101 (1969), this Court held that an Alabama statute requiring independent candidates to declare their intention to seek office two months earlier than under prior procedures imposed 'increased barriers' on candidacy and therefore warranted §5 scrutiny, 394 U.S., at 366, 22 L.Ed.2d 336, 89 S.Ct. 1101. Similarly, in contexts other than candidate qualification, we have interpreted §5 expansively to mandate pre-clearance for changes in the location of polling places; Perkins v. Matthews, supra; alterations of municipal boundaries, Richmond v. United States, 4422 U.S. 358, 45 L.Ed.2d 245, 96 S.Ct. 2296 (1975); Petersburg v. United States, 410 U.S. 962, 35 L.Ed.2d

698, 93 S.Ct. 1441 (1973), summarily affg 354 F.Supp. 1021 (DC 1972); Perkins v. Matthews, supra; and reapportionment and redistricting plans, Georgia v. United States, supra.

Had Congress disagreed with this broad construction of §5, it presumably would have clarified its intent when re-enacting the statute in 1970 and 1975. Yet, as this Court observed in Georgia v. United States, '[a]fter extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the Allen case was repeatedly discussed, the Act was extended for five years, without any substantive modification of §5.' 411 U.S., at 533, 36 L.Ed.2d 472, 93 S.Ct. 1702 (footnote omitted). Again, in 1975, both the House and Senate Judiciary Committees, in recommending extension of the Act, noted with approval in the 'broad interpretations to the scope of Section 5' in Allen and Perkins v. Mastthews, S. Rep. NO. 94-295, p. 16 (1975) (hereinafter S.Rep.); HR. Rep. No. 94-196, p. 9 (1975) (hereinafter HR. Rep.). Confirming the view of this Court, the Committee Reports stated, without qualifiction, that '[section 5 of the Act requires review of all voting changes prior to the implementation by the covered jurisdictions.' S. Rep. 8 (emphasis added).

The Attorney General's regulations, in force since 1971, reflects an equally inclusive understanding of the reach of §5. They provide that '[a]ll changes affecting voting, even though the change appears to be minor or indicted,' must be submitted for prior approval. 28 CFR §51.4(a) (1977). More particularly, the

regulations require preclearance of '[a]ny alteration affecting the eligibility of persons to become or remain candidates or obtain a position on the ballot in primary or general elections or to become or remain officeholders.' §51.4(c)(4). Pursuant to these regulations, the Attorney General, after being apprised of Rule 58, requested its submission for §5 clearance. Given the central role of the Attorney General in formulating and implementing §5, this interpretation of its scope is entitled to particular deference. United States v. Board of Comm'rs of Sheffield, 435 U.S., at 131, 55 L.Ed.2d 148, 98 S.Ct. 965; Perkins v. Matthews, supra, at 391, 27 L.Ed.2d 476, 91 S.Ct. 431. See Georgia v. United States, 411 U.S., at 536-539, 36 L.Ed.2d 472, 93 S.Ct. 1972.

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5 For example, we noted that Attorney General Katzenbach, who played a substantial role in drafting the Act, testified that the term 'practice' in §5 was inended to be all inclusive. . . ." Hearings on S 1564 before the Senate Committee on the Judiciary, 89th Cong. 1st Sess. 192 (1965), quoted in Allen v. State Board ofElections, supra, at 566-567, and n. 31, 22 L.Ed.2d 1, 89 S.Ct. 817.

6 The protean stategies of racial discriminationthat led Congress to adopt the Voting Rights Act have been often discussed by this Court. See United States v. Board of Comm'rs of Sheffield, 435 U.S. 110, 118-121, 55 L.Ed.2d 148, 98 S.Ct. 965 (1978); South Carolina v. Katzenbach, 383 U.S. at 308-315, 15

L.Ed.2d 769, 86 S.Ct. 803, and need not be reviewed here.

7. Shortly before the commencement of this litigation, counsel for appellate [Sic] brought Rule 58 to the attention of the Civil rights Division of the Department of Justice. Two and one-half months after appellee filed his complaint. Assistant Attorney General Pottinger informed the Superintendent of the Doughtery County School System that Rule 58 should be submitted for preclearance. Appellants made no response.

In applying those views to Rule 58 and concluding that Rule 58 was a change within the definitional terms of Section 5 and having the potential for diluting the value of the Negro·vote, the Supreme Court further explained its views:

Despite these consistently expansive constructions of §5, appellants contend that the Attorney General and District Court erred in treating Rule 58 as a 'standard, practice, or procedure with respect to voting' rather than as simply 'a means of getting a full days work for a full days pay-nothing more and nothing less.' Brief for Appellant 20. In appellants' view, Congress did not intend to subject all internal personnel measures affecting political activity to federal superintendence.

The Board mischaracterizes its policy. Rule 58 is not a neutral personnel practice governing all forms of absenteeism. Rather, it specifically addresses the electoral process, singling out candidacy fo elective ofice as a disabling activity. Although not in form a filing fee, the Rule operates in precisely the same fahion. By imposing substantial economic disincentives on employees who wish to seek elective office, the Rule burdens entry into elective campaigns and, concomitantly, limits the choices available to Dougherty County voters. Given the potential loss of thousands of dollars by employees subjct to Rule 58, the Board's policy could operate as a more substantial inhibition on entry into the elective process than many of the filing-fee changes involving only hundreds of dollars to which the Attorney General has successfully interposed objections. That Congress was well aware of these objections is apparent from the Committee Reports supporting extension of the Act in 1975. S.Rep. 16-17; HR. Rep. 10.

In Georgia v. United States, we observed that '[s]ection 5 is not concerned with a simple inventory of voting procedures, but rather with the reality of changed practices as they affect Negro voters.' 411 U.S., at 531, 36 L.Ed 2d 472m 93 .Ct. 1702. The reality here is that Rule 58's impact on elections is no different from that of many of the candidate qualification changes for which we have previously required preclearance. See Hadnott v. Amos, 394 U.S. 358, 22 L.Ed.2d 336, 89 S.Ct. 1101; Allen, 393 U.S. at 551, 22 L.Ed.2d ;. 89 S.Ct. 817.Moreover, as a practical

matter, Rule 58 implicates the political process to the same extent as do other modifications that this Court and Congress have recognized §5 to encompass, such as changes in the location of polling places, Perkins v. Matthews, and alternations in the procedures for casting write-in vote, Allen v. State Board of Elections, supra.

We do not, of course, suggest that all constraints on employee political activity affecting voter choice violate §5. Presumably, most regulation of political involvement by public employees would not be found to have an invidious purpose or effect. Yet the same could be said of almost all changes subject to §5. According to the most recent figures available, the Voting Rights Section of the Civil Rights division processes annually some 1,800 submissions involving over 3,100 changes and interposes objections to less than 2%. Attortney General Ann Rep 159-150 (1977). Approximatdely 91% of these submissions receive clearance without further exchange of correspondence. Tr. of Oral Arg. 53. Thus, in determining if an enactment triggers §5 scrutiny, the question is not whether the the provision is in fact innocuous and likely to be approved, but whether it has a potential for discrimination. See Georgia v. United States, supra, at 534, 36 L.Ed.2d 472, 93 S.Ct. 1702; Perkins v. Matthews, 400 U.S., at 383-385, 27 L.Ed.2d 476, 91 S.Ct. 431; Allen v. Sate Board of Elections, supra, at 555-556, n. 19, 558-559, 570-571, 22 L.Ed.2d 1, 89 S.Ct. 817.

Without intimating any views on the substantive question of Rule 58's legitimacy as a nonracial personnel measure, we believe that the circumstances surrounding its adoption and its effect on the political process are sufficiently suggestive of the potential for discrimination to demonstrate the need for preclearance. Appellee was the first Negro in recent years to seek election to the General Assembly from Dougherty County, an area with a long history of racial discrimination in voting. Less than a month after appellee announced his candidacy, the Board adopted Rule 58, concededly without any prior experience of absenteeism among employees seeking office. That the Board made its mandatory leave-of-absence requirement contingent on candidacy rather than on absence during working hours underscores the Rule's potential for inhibiting participation in the electoral process.

Plainly, Rule 58 erects 'increased barriers' to candidacy as formidable as the filing date changes at issue in Hadnott v. Amos, supra, at 366, 22 L.Ed.2d 336, 89 S.Ct. 1101 (2 months), and Allen v. State Board of Education, supra, at 551, 22 L.Ed.2d 1, 89 S.Ct. 817 (20) days. To require preclearance of Rule 58 follows directly from our previous recognition that §5 must be given 'the broadest possible scope' Allen v. State Board of Elections, supra, at 567, 22 L.Ed.2d 1, 89 S.Ct. 817, encompassing the 'subtle, as well as the obvious,' forms of discrimination. 393 U.S., at 565, 22 L.Ed.2d 1, 89 S.Ct. 817. Informed by similarly expansive legislation and administrative understandings of the

perimeters of §5, we hold that obstacles to candidate qualification such as the Rule involved here are 'standard[s], practice[s], or procedure[s] with respect to voting.'

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10 As this Court has recognized in its decisions, invalidating certain filing-fee schemes under the Fourteenth Amendment, "we would ignore reality' were we not to acknowledge that a financial varrier to candidacy 'falls with unequal weight on voters, as well as candidates,' since it 'tends to deny some voters the opportunity to vote for a candidate of heir choosing.' Bullock v. Carter, 405 U.S. 134, 144, 31 L. Ed.2d 92, S.Ct. 849 (1972) (filing fees of $1,424.60 for County Commissioner, $1,000 for Commissioner of General Land Office, and $6,300 for County Judge). See also, Lubin v. Panish, 415 U.S. 709, 39 L.Ed.2d 702, 94 S.Ct. 1215 (1974) (filing fee of $701.60 for County Supervisor).

11 For a review of voting rights litigation in the City of Albany, the county seat of Dougherty County containing 80% of its population, see Paige v. Gray, 399 F. Supp. 459, 461-463 (MD Ga. 1975), vacated in part, 538 F.2d 1108 (CA5 1976), on remand, 437 F.Supp. 137, 149-158 (MD Ga. 1977)

12. The dissent suggests, post at 53, 58 L.Ed.2d, at 287, that Rule 58 is directed only toward barring "the expenditure of public funds to support the candidacy of an employee whose time and eneregies may be devoted to campaigning, rather than counseling school children." Insofar as the Board

is concerned about its employees' failure to discharge their contractual obligations whild standing for office, it has a variety of means to vindicate its interest. The Board may, for example, prescribe regulations governing absenteeism, or may terminate or suspend the contracts of employees who willfully neglect their professional responsibilities. See Ga. Code §32-2101c (1975); Ransun v. Chattooga County Board of Education, 144 Ga. App. 783, 242 SE2d 374 (1978). What it may not do is adopt a rule that explicitly and directly burdens the electoral process without preclearance.

Question to be Decided

42 U.S.C. §1973c, commonly called Section 5 of the Voting Rights Act, encompasses "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964. . .." The first part- "any voting qualification or prerequisite to voting. . .different from that in force or effect on November 1, 1964. . ." plainly applies just to the

voting process. Since petitioner complains of [Sic] after the voting policies - applicable to those who have been elected by votes already cast - we are not concerned with the first part of the statute. We are, however, concerned with the second part - "any . . .standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964. . ."and must resolve whether or not the complained of conduct of the defendant board constitutes "any . . .standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964. . ." In so deciding we first must determine whether or not there is "any. . .standard, practice, or procedure. . .different from that in force or effect on November 1, 1964. . . ."

The parties stipulated that on November 1, 1964, the defendant board had no standard, practice or procedure pertaining to employees elected to public office taking leave without pay to attend to the duties o elevted ofice. Since any such standard, practice or procedure adopted after November 1, 1964, would thus be different, it is only necessary to determine whether or not the defendant board adopted any such standard, practice, or procedure.

In determining whether or not any such standard, practice, or procedure was adopted, Rule 58, because it was found to be in violation of the Voting Rights Act and as a matter of law never in effect, see Terrazas v. Clements, 537 F.Supp. 514, 520 (D.C. Tex. 1982), cannot be taken into consideration. The earlier litigation between these parties "wiped [Rule 58] from

the books" as if it never existed. (Tr. p. 104).

Assuming that this court finds that any such standard, practice, or procedure was adopted, the second question to be answered is whether or not it is "with respect to voting. . . ."

Contentions of the Parties

Plaintiff first argues that the defendant school board had no policy concerning leave without pay for employees holding elective office to attend to the duties of office and that the adoption of a policy prohibiting such leave is a "standard, practice, or procedure with respect to voting" - a change from no policy to some policy - a change encompassed by Section 5 and therefore ineffective until Section 5 clearance is

obtained. For that argument plaintiff relies upon NAACP v. State of Georgia, 494 F.Supp. 668 (N.D.Ga. 1980) (Tr. p. 99).

Plaintiff's second argument is that defendant board of education has adopted a policy of considering requests of employees for leave without pay to attend to the duties of elective office on a case-by-case basis; that policy is a change encompassed by Section 5 and therefore ineffective until precleared (Tr. p. 100).

Plaintiff also relies upon the Justice Department's suggestion by letters that a covered change has occurred. Supporting that argument is §51.5(c)(4) of the Attorney General's regulations which require Section 5 preclearance of "[a]ny alteration affecting the eligibility of persons to become or remain candidates or obtain a position on the ballot in primary or general elections or to become or remain

officeholders." 28 CFR §51.4(c)(4)(emphasis added); 439 U.S. at 39, 58 L.Ed.2d at 278. The ability of plaintiff White to remain an officeholder, they thus suggest, has been impaired by the school board's policy of not granting such leave.

In response defendant school board argues that plaintiff in effect is suggesting that under the Voting Rights Act the Attorney General or the United States District Court for the District of Columbia must pass judgment upon every board of education decision to grant or withhold leave without pay to an elected official to attend to the duties of his office. If this be true, the defendant board suggests the Voting Rights Act has removed the board's authority to do anything without going to Washington for approval. See, Justice Powell's dissent, 439 U.S. at 54, 58 L.Ed.2d at 287. The school board further

argues that the plaintiff's argument that every such decision must be precleared was answered by footnotes 3 and 12 of the majority opinion of the Supreme Court of the United States, to wit:

> 3. The Solicitor General and counsel for appellants advise us that appellee was also on unpaid leave during his participation in the annual two and one-half month sittings of the Georgia General Assembly in 1975, 1976, 1877, and 1978. Brief for United States as Amicus Curiae 4 n.1; Tr. of Oral Arg. 6. Appellee did not challenge this application of Rule 58 below. We therefore do not consider whether preclearance is required for a policy governing mandatory leaves during the interval in which an employee is actually absent due to legislative responsibilies.
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> 439 U.S. at 35, 58 L.Ed.2d at 275
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> 12. The dissent suggests, post a 53, 58 L.Ed.2d at 287, that Rule 58 is directed only toward barring 'the expenditure of public funds to support the candicacy of an employee whose time and energies may be devoted to campaigning, rather than counseling school children.' Insofar as the Board is concerned about its employees' failure to discharge their contractual obligations while standing for office, it has a variety of means to vindicate its interest. The Board, may, for example, prescribe regulations governing absenteeism, or may terminate or suspend the contracts of employees

> who willfully neglect their professional responsibilities. See Ga. Code §32-2101c (1975); Ransum v. Chattooga County Board of Education, 144 Ga. App. 783, 242 S.E.ed 374 (1978). What it may not do is adopt a rule that explicitly and directly burdens the electoral process without preclearance. (emphasis added).

439 U.S. at 42, 58 L.Ed.2d at 280. The defendant school board in effect says it has done exactly what the Supreme Court said it could do without going to Washington for approval or disapproval - "prescribe regulations governing absenteeism" on account of its concern about its employee's failure to discharge his contractual obligations.

Did the School Board Enact or Seek to Administer a Different Standard, Practice or Procedure?

In May, plaintiff John E. White, A Negro, and employee of defendant board of education, announced his intention to run for the office of state representative. He qualified to run in June, but was defeated in the August primary. In 1974, he

qualified, ran, and was elected in both the August primary and November general elections. In June, 1976, he qualified again and without opposition was elected in November. Because of Rule 58 he took no leaves of absence without pay from time to time during his candidacies, but that ceased on March 27, 1977, when this court enjoined use of Rule 58; shortly thereafter - April 11, 1977 - the defendant school board rescinded Rule 58.

Plaintiff White was employed by the defendant school board under a twelve-month contract. In common with all other school board employees he was permitted to be absent with pay for vacation, personal leave, and sick leave. Desiring to also be absent from work but without pay for such additional time as was required to attend the January until March, 1978 legislative session and necessary committee meetings, Mr. White requested and was granted leave

without pay for the 1978 legislative session and necessary committee meetings,

That decision pertained only to Mr. White and his absence for that particular session; it thus did not constitute a "standard,[4] practice,[5] or procedure[6]"

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[4] Standard means:

Stability, general recognition, and conformity to establish practice. Standard Accident Ins. Co. v. Standard Surety & Casualty Co., D.C.N.Y., 53 F.2d 119, 120. A type, model, or combination of elements accepted as correct or perfect. A measure or rule applicable in legal cases such as the 'standard of care in tort actions. Double standard; Reasonable man doctrine or standard; Standard of care.

An ensign or flag used in war. Black's Law Dictionary, 5th Ed.

[5] Practice means:

Repeated or customary action; habitual performance; a succession of acts of similar kind; custom; usage. Application of science to the wants of men. The exercise of any profession. . . . Black's Law Dictionary, 5th Ed.

[6] Procedure means:

The mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right, and which, by means of the proceeding, the court is to administer; the machinery, as distinguished from its product. That which regulates the formal

pertaining to employee absence. It was nothing more than an individual personnel decision.

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steps in an action or other judicial proceeding; a form, manner and order of conducting suits or prosecutions. The judicial process for enforcing rights and duties recognized by substantive law and for justly administering redress for infraction of them. Sims v. United Pacific Ins. Co., D.D. Idaho, 51 F.Supp. 433, 435.

Procedure is machinery for carrying on suit including pleading, process, evidence and practice, whether in trial court or appellate court. Brooks v. Texas Em. Ins. Ass'n, Texas Civ. App. 358 S.W.2d 412, 414.

The law of procedure is what is commonly termed by jurists, 'adjective law' (g.v.).

Black's Law Dictionary, 5th Ed.

la: a particular way of doing or or going about the accomplishment of something (the book is lucid in its -- -H.B. Wehle) (democratic--) (told me he didn't especially like my --) b(1): a particular course of action (a -- that respects the dignity and worth of the individual - W.O. Douglas) (2): A particular step adopted for doing or accomplishing something (one of his first --s was to investigate the reports) (3): a series of steps followed in a regular orderly definite way: method (surgical --) (therapeutic --) (scientific --) c(1): a traditional, customary, or otherwise established or accepted way of doing things (told him it was not the -- of citizens of that country to act in that way (2): protocol 4 (sticklers for -- Time)

After Mr. White was re-elected in November, 1978, he and school board employees Parkman and Cutler, who ran for the first time in 1978 were elected as state represenative and county commissioner, made a joint request for leave without pay to attend to their respective duties. Told first of the board's policy that all twelve-month employees will be expected to work the entire twelve months except for vacation time, their request was approved with the understanding that a two-year study of the effect of their absences for political purposes on their job performance would be

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d: an established way of conducting business (as a deliberative body: as (1): the accepted usage of parliamentary bodies; established parliamentary practice: parliamentary order (rules of --) (2): the established manner of conducting judicial business and litigation including pleasing, evidence, and practice. 2a obs: the progress of continuation of some action or process b. aemchair the fact of issuing from a source.

made and the matter would be reconsidered at that time. A "standard, practice, or procedure" being at the least a precedent on which the affected employees and others may rely, the defendant board put those employees on notice that this decision created no precedent by advising that a two-year effect on job performance study would be conducted and the matter reconsidered at the end of that study. No "standard, practice, or procedure" was thus established. It was nothing more than three individual personnel decisions. Following the board's decision regarding Mr. White, Mr. Cutler, and Mrs. Parkman, the school superintendent formulated regulations to implement the experimental leave which had been granted. (Pl. Ex. 1.) These regulations relate only to the specific leave which had been granted; they do not evidence adoption of a political leave policy or practice.

On April 15, 1980, the defendant board met and in the light of the promised two-year study of the effect of the absences of its elected employees on their job performance, decided not to allow its employeess to be absent without pay to attend to their elective offices. While the defendant board labeled this decision as one establishing a policy on political leave, the board in reality decided not to allow its employees who are elected to public office greater time away from the job than they and all other employees are otherwise allowed. That usual time can be used at the option of the employee, not only for vacation and personal leave but also to attend to the duties of elective office. Otherwise employees are expected to perform their contracts.

If the board had thereafter arbitrarily refused to consider requests for political leaves of absence on an individual basis,

the plaintiff's argument that the April, 1980, board action constituted an adoption of a "standard, practice, or procedure" different from that previously administered might be persuasive; but the board continued to consider each of Mr. White's requests. For instance, following his re-election in November, 1980, to another two-year term Mr. White requested unpaid leave from January-March, 1981 (Pl. Ex. 4). At its December 15, 1980, meeting

> The board considered John White's request for political leave, and after a discussion of the effect of his absences from his position at the Albany Area Vocational Technical School, voted to deny his request. The vote, with Mr. Warren, the chairman, voting against allowing the leave, was five to one for denial of the request. . . ." (Pl. Ex. 6).

The board informed Mr. White of its decision and expectation that he fulfill his contract for the school year. (Pl. Ex. 5).

Further, in January, 1983, Mr. White specifically requested the board to adopt a

policy allowing legislative leave (Def. Ex. 6); when his request was denied (Def. Ex. 7) he then sought a leave of absence for himself to serve during the remaining weeks of the 1983 legislative session (Def. Ex. 8). The board expressed its willingness to meet with him in that regard (Def. Ex. 9).

Thus, the board's April 1980, action constituted nothing more than its refusal to adopt a legislative leave policy and served in effect as a reaffirmation of its policy requiring employees to fulfill their contracts with the exception of time away from the job allowed to all.

With due respect to NACCP v. State of Georgia, 494 F.Supp 668, relied upon by plaintiff, the judges of this court fail to perceive how a negative decision can create a "standard, practice, or procedure" for anything. If it did, every decision of every covered political entity would be encompassed by Section 5; covered entities

could not say "yes" or "no" without asking the United States District Court for the District of Columbia or the Attorney General.

Plaintiff's argument that the decision to consider such requests one at a time is a change, is no more convincing. As a matter of common sense, decisions on individual personnel matters have always been made on an individual basis, both before and after the Voting Rights Act. That is hardly a change.

Before and after this litigation the defendant board of education had neutral personnel policies and practices governing all forms of absenteeism. The defendant board has simply refused to alter those neutral policies and practices. Plaintiff does not suggest, and the evidence in no way shows, that the refusal of the board has potential for discrimination. This court likewise fails to perceive how the

board's refusal to change its neutral personnel policy could possibly be a constraint on employee political activity or burden theelectoral process.

Viewed from every angle and in the brightest light of the Supreme Court broad interpretations[7/] of the words "standard, practice, and procedure," this board's refusal to alter its neutral personnel policies to accommodate this employee elected officeholder does not possibly constitute a Section 5 "standard, practice or procedure."

The Attorney General's Regulations

As already mentioned, the Attorney General's regulations require Section 5 preclearance of "[a]ny alterations affecting the eligibility of persons

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7/ See Allen v. Board of Elections, 383 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969) and White v. Dougherty County Board of Education, 439 U.S. 32, 58 L.Ed.2d 269, 99 S.Ct. 368.

to become or remain candidates or obtain a position on the ballot in a primary or general elections or to become or remain officeholders."28 CFR §51.4(c)(4) (emphasis added).

At the time plaintiff White first announced his candidacy in 1972 he was employed by defendant board of education under a twelve-month contract and, like all other employees, was entitled to be absent with pay for certain specified purposes such as vacation and sickness. When plaintiff White announced, he was the first employee of the defendant board to run for public office. The defendant board had never been presented with the question of whether or not to allow leave, without pay, to an employee to attend to the duties of elective office. Before announcing his candidacy he did not ask the defendant board to consider the question. His request for additional leave without pay

came only after he was elected. Since such leave was not allowed to any employee before Mr. White was elected, the failure of the defendant board after his election to allow such leave in no way altered or changed the ability of Mr. White to remain an officeholder. Given the particular deference it deserves, see 439 U.S. 39, 58 L.Ed.2d at 278, the Attorney General's regulation thus does not support the plaintiff's position that the refusal to adopt a leave with pay policy is a Section 5 "standard, practice, or procedure."

There having been no "standard, practice, or procedure" enacted or sought to be administered, it is unnecessary to consider whether or not the conduct of the defendant board was "with respect to voting."

CONCLUSION

The plaintiff John E. White has failed to prove that the defendant Dougherty

County Board of Education has enacted or sought to "administer any. . .standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964. . . ." 42 U.S.C. §1973e. The Voting Rights Act has therefore not been violated, and the plaintiff is not entitled to the injunction that he moved for

Let judgment be entered for the defendants.

SO ORDERED, this 10th day of February, 1984

/s/_____
WILBUR D. OWENS, JR.
United States District Judge

/s/_____
J. ROBERT ELLIOTT
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDE DISTRICT OF GEORGIA
ALBANY DIVISION

JOHN E. WHITE,	)	
	)	CIVIL ACTION
Plaintiff,	)	
	)	NO. 81-20-ALB
vs.	)	
	)	
DOUGHERTY COUNTY BOARD OF EDUCATION, et al.,	)	
	)	
Defendants.	)	
	)	

BEFORE ANDERSON, Circuit Judge, OWENS and ELLIOTT, District Judges.

ANDERSON Dissenting:

The issue before this court is whether the Dougherty County Board of Education changed a "standard, practice, or procedure with respect to voting" when it ceased granting leave of absence to state legislator John White. This question of statutory interpretation does not require an opinion about the ultimate wisdom or validity of the change,[1] but only a

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[1]To the extent that the majority has relied on the evidence of White's absenteeism and the wisdom or merit of the "no leave" decision as a personnel practice, I submit

determination of whether such a "change of practice" has occurred. In my judgment the majority opinion conflicts with Section 5 of the Voting Rights Act, 42 U.S.C. §1973(c), particularly as interpreted by the Supreme Court in Dougherty County Board of Ed. v. White, 439 U.S. 32 (1978). Therefore, I respectfully dissent.

I. FACTS

The following facts are undisputed. In 1964, when the Voting Rights Act became effective, the Board had no policy concerning employee leave of absence to serve in political office. Such was the case until 1972, when employee White declared his candidacy for state

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that it succumbs to an improper perspective of the issue before this court. If the propriety of the practice were a proper subject for our attention, I would probably agree with the majority. However, it is unmistakably clear that, in applying the pre-clearance requirement of Section 5, we are not to ask "whether the provision is. . .innocuous and likely to be approved." Dougherty County Bd of Ed. v. White, 439 U.S. at 42.

legislature, the first black in the county within memory to do so. At that time, the Board adopted "Rule 58," which forced White to take unpaid leave during the campaign and any period of officeholding. Despite requests from the Justice Department, the Board refused to follow the pre-clearance requirement of Section 5 by seeking federal authorization for the rule.

In 1976, White filed suit against the Board, challenging the part of Rule 58 that required him to take leave during his campaign for office.[2] A three-judge district court held that the rule could not be applied until pre-cleared in accord with the Voting Rights Act, White v. Dougherty County Bd. of Ed., 431 F.Supp. 919 (M.D. Ga. 1977). The Supreme Court affirmed. Dougherty County Bd. of Ed. v. White, 439 U.S. 32 (1978). Rather than submit

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[2]White did not challenge the part of the rule which required leave during terms of officeholding. See Dougherty County Bd. of Ed. v. White, 439 U.S. at 35 n.3.

Rule 58 to the Attorney General or District Court for the District of Columbia for Section 5 pre-clearance, the Board rescinded the rule in 1977.

After the recission, White was no longer forced to take unpaid leave during a campaign for office. He continued, however, to request leave so that he could serve during Georgia's 40-day legislative term. Other Board employees also sought leave to serve in political office. From 1977 to 1980, these requests for political leave were granted. The Superintendent's office promulgated a set of regulations about the administration of political leave. The Board informed White that it planned to study the effects of such leave on absenteeism and reassess the decision to grant leave at a later date.

Following the 1980 legislative term, the Board considered the Superintendent's study of absenteeism due to political

leave. The minutes of the April 15, 1980 Board meeting report the following decision:

> The question of granting leave of absence for political purposes was brought before the Board. Following discussion concerning the question, Mr. Murphy moved that no leaves of absences be granted to personnel of the Dougherty County School System for political purposes. Mr. Hall seconded the motion and the same was approved by a vote of five to one.

White was notified of this decision on April 22 by a letter from Superintendent Robertson which stated that "[t]he Dougherty County Board of Education has decided that the Dougherty County School System will not grant any leaves of absence to its personnel for political purposes."

In November of 1980, White requested that the Board grant him leave to serve during the 1981 term. The Board minutes show that on December 15, after discussing the effects of White's absenteeism, the Board denied White's request. Subsequent

requests by White and others have all been denied by the Board. The Justice Department has notified the Board that its new policy on political leave should be submitted for pre-clearance, but the Board has refused to submit it.

II. DISCUSSION

White contends that in deciding not to grant any leaves of absence for political purposes, the Board changed its practice of permitting such leave and was thus required to obtain federal pre-clearance. The Board contends that there has been no such change; it argues that the pre-1980 decisions to grant leave were merely case-by-case evaluations and that, despite the unequivocal language in the April 1980 Board minutes, it has continued to review requests on a case-by-case basis. This discussion will explain that (a) the April 1980 Board action coinstituted the adoption of a "no leave" policy; and (b) even if the

requests for political leave are still given case-by-case consideration, the actions of the Board under the circumstances here nevertheless constitute a "change in practice" as defined by the Voting Rights Act.

A. The Board Adopted a "No Leave" Policy.

If the evidence shows that the Board adopted a per se "no political leave" policy on April 15, 1980, it could hardly be argued that such a policy would not constitute a change requiring pre-clearance. Because the majority concludes that there was no change, it apparently accepts the Board's contention that political leave is still considered on an individual basis.[3] I respectfully submit

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[3]The majority's opinion on this factual matter is somewhat ambiguous. At one point it states:

> [I]t is thus the policy and practice of the defendant board of education to deny its employees' requests for leaves of absence without pay to attend to the duties elective office. . .

that the majority's conclusion has a very weak support in the evidence.

Whatever the Board's motivation, it granted all requests for political leave from 1977 through 1980. The Board,

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Majority Opinion at 10. The opinion later suggests, however, that the majority views the actions of the Board after April, 1980 as a continuation of the case-by-case consideration.

> While the defendant Board labeled this decision as one establishing a policy on political leave, the board in reality decided not to allow its employees who are elected to public office greater time away from the job than they and all other employees are otherwise allowed. That usual time can be used at the option of the employee, not only for vacation and personal leave but also to attend to the duties of elective office. Otherwise employees are expected to perform their contracts.

Id. at 23,24. It is worthy of note that even the latter articulation by the majority implicitly acknowledges that the Board would not entertain requests for absence when the only reason justifying the request was related to political office. In other words, the Board simply was no longer going to consider the desire to hold political office as a factor in granting leave. I submit that this is vastly different from the case-by-case individual consideration which the Board would give, for example, to a request by a history

considering the "two-year study" of absenteeism conducted by the Superintendent, voted on April 15, 1980, that "no leaves of absences will be granted to personnel of the Dougherty County School System. . . for political purposes" (emphasis added). Even though White had not at that time requested the Board's consideration of the political leave question, Superintendent Robertson took it upon himself to write White and declare that the Board "has decided that the Dougherty County School System will not grant any leaves of absences to its personnell for political purposes" (emphasis added. The language of the Board minutes and the Robertson letter could not be more clear in establishing an intent to deny political leave altogether.

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teacher to go to Egypt where she would have the opportunity to observe and study the pyramids.

The Board's contention that it continued to consider requests for political leave on a case-by-case basis is unpersuasive for two reasons. First, the only evidence to support this view, aside from bald post facto assertions, is an indication in the December, 1980 Board minutes that White's request for leave was denied "after a discussion of the effect of December reference to White's absence does not demonstrate new consideration, but merely a re-hashing of the previously considered reasons. The Board's own characterization of the April decision casts doubt upon the sincerity of its later rationalization.

Second, in contrast to the sparse and ambiguous evidence supporting the Board's case-by-case assertion, there is strong and convincing evidence that the Board did not change its prior practice of permitting political leave, adopting a "no leave"

policy in April of 1980. The April 15, 1980, minutes so state in unequivocal terms: "no leaves of absence. . .to personnel. . .for political purposes." Following that meeting, the Superintendent on April 22 wrote a letter to White again articulating that the Board would not "grant any leaves of absence to its personnel for political purposes." The fact that the April 1980 decision was made as the result of the Superintendent's two-year study of the matter of political leaves of absence indicates that the policy was a new policy, and not merely a continuation of a prior case-by-case policy. Finally, it is significant that political leave was in fact granted to White and others for the legislative sessions in early 1978, 1979, and 1980; but that, after the April 1980 decision, all requests for political leave were denied.

I respectfully submit that it requires a strained interpretation of the evidence to accept the Board's assertions that it has maintained a case-by-case policy.[4] In my judgment, the sparse and ambiguous

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[4]The Board claims that the April 15 ruling merely affirmed an earlier decision that all employees would fulfill the terms of their employment contracts. However, the Board adopted its "fulfill the contract" policy in 1978. That policy did not prevent the Board from thereafter granting political leave for the legislative sessions in 1979 and 1980. Thus, it cannot be argued that the April, 1980, ruling merely affirmed an earlier "fulfill the contract" policy.

The majority suggests a different interpretation, calling the April, 1980 action a "refusal to adopt a legislative leave policy." Majority Opinion at 24. I can find no evidence that White or anyone else had requested the Board in April of 1980 to adopt a legislative leave policy. The only evidence suggesting that the Board refused to adopt a political leave policy related to later events. In 1983, after the Board had acted in April 1980 and after the Board had denied all subsequent requests for political leave, White wrote the Board requesting that it change its no leave policy. This request was rejected. This later action is not relevant to our determination of the scope and meaning of the Board's earlier action in April of 1980. I submit that the characterization of the Board's April 1980 action as a refusal to change a neutral policy is

evidence discussed above cannot be interpreted to overcome the plain meaning of the April "no leave" decision and other Board actions. I respectfully suggest that the evidence is almost overwhelming that, after April of 1980, the Board would not consider the holding of elective office as a factor in the decision to grant leave. Thus, I dissent.

B. Assuming Arguendo a Case-by-Case Approach, the Board's Actions Constitute a Change of Practice.

The majority finds that the Board has continued to consider requests for political leave on a case-by-case basis, and then concludes that there has been no change in a "standard, practice or procedure with respect to voting." Assuming arguendo the majority's case-by-case finding, I respectfully submit that the changed pattern of decision-making here

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crucial to the majority's reasoning and I respectfully suggest that there is no evidence to support that characterization.

is sufficient to establish a legal "change of practice" under the Supreme Court's broad reading of the Voting Rights Act.

The legislative history of the pre-clearance requirement demonstrates that it was meant to be interpreted expansively. Dougherty County Bd. of Ed. v. White, 439 U.S. at 39. When it was before Congress, Attorney General Katzenbach testified that the phrase "Practice" (with respect to voting) should be "all-inclusive." Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., Pt. 1, pp. 191-92 (1965). This breadth of interpretation is necessary to prevent subtle techniques of discrimination that affect the electoral process. Allen v. Board of Elections, 393 U.S. 544, 565 (1969).

As a corollary to the expansive interpretation given the Act, courts have accorded "particular deference" to government officials charged with enforcing

its provisions. Dougherty County Bd. of Ed. v. White, 439 U.S. at 39-40; United States v. Board of Commissioners of Sheffield, 435 U.S.. 110, 131-32 (1978). See also 28 C.F.R. §51.3 (1983) (designating officials within the Justice Department with authority to administer the Act).

A final focus guiding interpretation of the Act is its overarching concern for preventing voting changes that may present a "potential for discrimination." Dougherty County Bd. of Ed. v. White, 439 U.S. at 42. While the statutory language of Section 5 requires pre-clearance for any changed "standard, practice or procedure with respect to voting," the concern with discrimination should illuminate that inquiry, implicating even innocuous changes that involve sucn a potential. Id.

Considering these well established statutory guidelines -- the expansive interpretation of the Act, deference to

enforcement officials, and concern for potential discrimination -- the uncontroverted facts here persuade me that the Board has adopted a new "practice" vis-a-vis political leave even if it still operates case-by-case. Prior to 1980, the Board always granted political leave. [5] In April, 1980, it considered a two-year study of absenteeism and decided to grant no more leave. Since that decision, there has been no grant of political leave. The new focus of decision-making resulting from the study and from the April 1980 decision, coupled with the complete turnaround from the Board's past actions, warrant the conclusion that there is a changed "practice."

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[5] This uniform treatment of requests for political leave during the years 1977-80 meets the majority's own definition of "practice," drawn not from applicable legislative history but instead from Black's Law Dictionary, 5th ed. ("Repeated or customary action; habitual performance; a succession of acts of similar kinds. . .").

Application of the above-mentioned Supreme Court guidelines compels this result. First, it would run against the expansive interpretation of the statute to overlook the Board's drastically different pattern of decision-making simply because the Board claims to be operating "case-by-case." Support for this proposition is gleaned from 28 C.F.R. §51.13 (1983). If a covered entity implements a "recurrent practice" (e.g., case-by-case consideration of whether to grant political leave), then a statutory change occurs when "the rules for determining when such a practice or procedure will be implemented are changed." Id. The Board claims that it began to deny political leave because a "two-year study" showed that absenteeism was harmful. To the extent that this study injected a new and significant factor into the "case-by-case" deliberation, a "change or practice" has occurred.

The second guideline, deference to officials charged with enforcing the Act, also supports the conclusion that the Board did indeed change its practice. The Department of Justice made three requests that the Board submit its new practice on granting political leave and the Board refused. The June 30, 1981, letter forcefully stated that the Department's position that the "changes in the board's treatment of political leave requests are subject to the pre-clearance requirements of Section 5."[6]

Finally, the "potential for discrimination" factor supports this conclusion that the Board's new pattern of decisions is a "change in practice." In the first White case, the Supreme Court

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[6]The majority quotes the first letter from the Department of Justice and highlights its discussion of an apparent change in voting procedures. Majority Opinion at 8. The majority fails to discuss, however, the second and third letters from the Department in which, following further investigation, the officials clearly state their position that an actual change has occurred.

noted that John White was the first black candidate for the state legislature in a county with a long history of racial discrimination in voting practices. Dougherty County Bd. of Ed. v. White, 439 U.S. at 42. The concern that discrimintion might have affected the school bord regulation burdening his candidacy was a special consideration suggesting the need for pre-clearance. Id. The Supreme Court's analysis of the potential for discrmination in that case is equally applicable here. This case involves the same county history of discrimination, the same school board, and the same school employee. If the "potential for discrimination" was of concern in the previous case, it must of necessity be a greater concern here. The instant case adds the fact that the Board has rescinded Rule 58, which

White found to be a potentially discriminatory rule affecting candidacy, and has adopted another practice, which was expressed in terms flatly prohibiting political leaves of absence, and which, even if interpreted to have some flexibility, has resulted in practice in the denial of every request for political leave.

For the foregoing reasons, I respectfully submit that the analysis prescribed in White compels a conclusion that the Board's actions under the circumstances here constitute a change of practice.[7] Thus, I dissent.

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[7] The Board attempts to bring itself under the protection of footnote 12 of the White opinion, which suggests that a neutral personnel policy governing absenteeism generally would not require pre-clearance. The discussion in this opinion demonstrates that the evidence here cannot be interpreted as involving a neutral rule. Rather, the evidence is clear that the Board's action, including in particular the two-year study and the April 1980 decision, has focused "explicitly and directly" on political leaves of absence, precisely the circumstance that the White footnote held would require pre-clearance.

III CONCLUSION

For the reasons discussed, I would find as a factual matter that the Board adopted a "no leave" policy or practice on April 15, 1980, which obviously constitutes a "change of practice." Alternatively, even assuming arguendo the majority's case-by-case finding, I would conclude as a matter of law that the Board's actions under the uncontroverted circumstances here constitute a "change of practice" when judged by the standards set out by the Supreme Court in White.[8]

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[8] Because the majority found no change in "practice," it did not go on to consider whether the change was one "with respect to voting." Majority Opinion at 27. Dougherty County Bd. of Ed. v. White, 439 U.S. 32, compels the conclusios that the changed practice is "with respect to voting," because by hampering White's ability to serve, it erects "increased barriers" to his candidacy and officeholding. Id. at 43. The barrier here, i.e., precluding leave altogether, is as significant as that in the previous case, i.e., presenting a financial disincentive to candidacy by requiring leave during the campaign. Furthermore, applicable regulations recognize that changes that affect an officeholder's ability to serve are appropriately within the scope of the Act. See 28 C.F.R.

I respectfully dissent.

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§51.12(g) (1983) ("Changes affecting voting include, but are not limited to, the following examples:. . .(g) any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.") (emphasis added).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

JOHN E. WHITE,
Plaintiff

vs

DOUGHERTY COUNTY BOARD
OF EDUCATION, et al
Defendants

Filed
February 13, 1984

C.A. No.
81-20-ALB

J U D G M E N T

Pursuant to the Opinion of the Court, and for the reaons stated therein, judgment is entered for the defendants.

This the 13th day of February, 1984.

GIRARD W. HAWKINS,
Clerk

By: s/
Betty R. Jones
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

JOHN E. WHITE,
Plaintiff

Filed
March 1, 1984

vs

DOUGHERTY COUNTY BOARD
OF EDUCATION, et al
Defendants

O R D E R

Plaintiff's motion to alter or amend this court's order of February 10, 1984, and judgment of February 13, 1984, having been carefully considered, is hereby DENIED.

SO ORDERED, this 1st day of March, 1984.

s/
Wilber D. Owens, Jr.
Chief United States District Judge

s/
J. Robert Elliott
United States District Judge

For the reasons already stated, I would

GRANT said motion and enter judgment in favor of the plaintiff.

SO ORDERED, this 1st day of March, 1984.

s/
R. Lanier Anderson, III
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

JOHN E. WHITE,
Plaintiff

vs

DOUGHERTY COUNTY BOARD
OF EDUCATION, et al
Defendants

Filed
March 14, 1984

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that JOHN E. WHITE, Plaintiff above-named, and Appellant on appeal, hereby appeals to the Supreme Court of the United States from the final judgment entered on February 13, 1984 which judgment was rendered on the basis of the order entered on February 10, 1984, and upon which judgment Plaintiff's Motion to Alter or Amend Judgement was denied by order entered on March 1, 1984

This appeal is taken pursuant to 28 U.S.C.A. Section 1253 and 42 U.S.C.A. 1973(c).

This 12th day of March, 1984.

s/ John R. Myer

CERTIFICATE OF SERVICE

I, JOHN R. MYER, counsel of record for the Appellant and a member of the Bar of this Court, do hereby certify that, in accordance with Rule 28, three (3) copies of the Jurisdictional Statement were served on Appellees by depositing same in the United States mail, first-class postage prepaid, and addressed to counsel for Appellees JESSE W. WALTERS, ESQ., Post Office Box 527, Albany, Georgia 31707.

This 14th day of May, 1984.

S/JOHN R. MYER

JOHN R. MYER

83 - 1868

No. 84-83

Office-Supreme Court, U.S.
FILED
AUG 29 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN E. WHITE,

Appellant,

v.

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION; R. H. WARREN, Chairman, Dougherty County Board of Education; MORGAN MURPHY; CHARLES L. NESBITT; FRANKLIN U. CROSS; MRS. CALISTA LANGSTAFF; JAMES H. HALL; MRS. LAURA TRIPLETT, Members of the Dougherty County Board of Education; PAUL ROBERTSON, Superintendant, Dougherty County School System, individually and in their official capacities,

Appellees.

On Appeal From The Three Judge United States District Court For The Middle District of Georgia Albany Division

MOTION TO AFFIRM

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BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-83

JOHN E. WHITE,

Appellant,

v.

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION; R. H. WARREN, Chairman, Dougherty County Board of Education; MORGAN MURPHY; CHARLES L. NESBITT; FRANKLIN U. CROSS; MRS. CALISTA LANGSTAFF; JAMES H. HALL; MRS. LAURA TRIPLETT, Members of the Dougherty County Board of Education; PAUL ROBERTSON, Superintendant, Dougherty County School System, individually and in their official capacities,

Appellees.

On Appeal From The Three Judge United States District Court For The Middle District of Georgia Albany Division

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of The Supreme Court of the United States and the letter of the Office of the Clerk dated July 12, 1984, moves that the final judgment of the district court be affirmed on the grounds that it is clear that the Dougherty County, Georgia, Board of Education has not violated the Voting Rights Act and that in reality this is not a valid Voting Rights Act case. The question presented is insubstantial and does not warrant further argument.

STATEMENT

This is a direct appeal from the final judgment of a three judge district court specially constituted pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 2284 entered the 13th day of February, 1984.

It was contended by Appellant that Appellee had violated Section Five of the Voting Rights Act of 1965, 42 U.S.C. § 1973c in that the Dougherty County Board of Education had enacted or sought to administer a standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964. The district court held that Appellant did not prove his contention and therefore the Voting Rights Act had not been violated and the Appellant was not entitled to the relief sought.

Appellee generally concurs with the Statement of the Case as set forth in Appellant's Statement as to Jurisdiction. However, it should be added that Mr. White was apprised in November of 1978 that the Board expected its employees to fulfill their contracts in their entirety. Further, that Mr. White annually thereafter entered into twelve month contracts with the Board.

ARGUMENT

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED BECAUSE THE QUESTION PRESENTED IS NOT A SUBSTANTIAL QUESTION. IN REALITY THE QUESTION PRESENTED IS A CONTRACT QUESTION AND IS NOT A VOTING RIGHTS QUESTION.

Section 5 of the Voting Rights Act of 1954, as amended, 42 U.S.C. § 1973c is as follows:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section

1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure: PROVIDED, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attor-

ney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

This case represents the second appearance of these parties before this Court. In Dougherty County Board of Education et al. vs White, 439 U.S. 32 (1978), (White 1), the first appearance of these parties, this Court held that the Board's then existing Rule 58 which mandated that a candidate for political office take leave of absence without pay from his position with the Board during candidacy and during service, if elected, violated the terms of the Voting Rights Act. However, White 1 is no authority for the preposition that the Dougherty County Board of Education has violated the Voting Rights Act in the instant case.

A history of the Dougherty County Board of Education reveals that no employee of the Board had offered for election to a political position prior to 1972 when John E.

White first offered for election to the General Assembly of Georgia. The Board had never had an occasion to consider the question of leave or no leave to serve in an elected position. In 1972, the Board considered the question for the first time and enacted Rule 58 which rule mandated leave of absence without pay during candidacy and during service.[1] In 1976, John E. White filed a Complaint in the District Court alledging that the Defendant Board of Education's Rule 58 was violative of the Voting Rights Act. The required Three Judge Court on March 27, 1977, agreed with Mr. White and enjoined the use of Rule 58 until the voting Rights Act was complied with. The Dougherty County Board of Education appealed the District Court's decision to this Court, and this Court on November 28, 1978, in a 5-4 decision affirmed the District Court White, supra. Furthermore, Rule 58 was rescinded by the Dougherty County Board of Education on April 11, 1977. The rescission of Rule 58 by the Board and the decision of this Court pertaining to Rule 58 put the Dougherty County Board of Education in the same identical position it was in on November 1, 1964, and that was; no policy, rule, standard, practice or procedure pertaining to leaves of absence for service in political positions.

On November 20, 1978, the Dougherty County Board of Education reaffirmed its position that all employees were expected to fulfill their contracts in their entirety. The Superintendent was directed to notify Mr. John White, Mrs. Lillian Parkman and Mr. Don Cutler, three

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[1] Rule 58—POLITICAL OFFICE: Any employee of the school system as becomes a candidate for any elected political office, will be required to take a leave of absence without pay, such leave becoming effective upon the qualifying for each elective office and continuing for the duration of such political activity and during the period of service of such office if elected thereto.

employees previously elected to political office, of the Board's position. Following notification, Mr. White, Mrs. Parkman and Mr. Cutler appeared before the Board in December of 1978 specifically requesting leaves of absence for what they defined as political leaves. Leaves were granted all three parties for the years 1979 and 1980 under the proviso that a two-year study of the effect of their absences for political purposes on their job performances would be made and following such study the matter would be reassessed.

Following the grant of leaves in December, 1978, the Superintendent and his staff promulgated what they referred to as "Administrative Regulations For Unpaid Political Leave." These regulations were nothing but guidelines for the parties who had been granted leaves by the administrative staff of the school system. Under no stretch of the imagination did such regulations constitute a policy, standard, practice or procedure of the Dougherty County Board of Education.

On April 15, 1980, the Board met, and in response to further requests for leave of absence for political purposes, considered such request in the light of the study of the effect of the absences of its elected employees on their job performances, decided not to allow its employees to be absent without pay to attend to their elected offices. The study revealed that Mr. White, if granted leave, would be absent from his duties with the school system approximately one-fourth of the time.

Mr. White was rehired for the school year 1980-1981 in April of 1980 and was advised that he was expected to fulfill his contract. Notwithstanding, on November 16, 1980, Mr. White requested what he defined as a political leave. On the date of December 5, 1980, Mr. White was advised by the then president of the Board that his re-

quest had been denied and that he was expected to fulfill his contractual obligations with the Dougherty County Board of Education.

In January of 1983, Mr. White sought to have the Board adopt a policy allowing legislative leave. This request was denied and Mr. White's request for a leave of absence to serve during the 1983 Legislative Session was denied.

The record is replete with evidence that the Dougherty County Board of Education considers each and every request for leave of absence without pay on a case by case basis and does not have a policy pertaining to the granting or refusing to grant an employee a leave of absence without pay for whatever purpose.

Mr. White puts great emphasis upon the fact that the administrative staff of the Dougherty County School System, subsequent to the Board's granting leaves of absence to three elected officials in December 1978, prepared what was designated by the staff as administrative regulations for unpaid political leave. A casual reading of these regulations reveals concisely that the same do not constitute any policy of the Board of Education. The Board had granted leaves to three people and the staff was deciding: (i) whether and in what manner the three parties would keep staff advised of their whereabouts; (ii) that the three parties did not use school facilities, material, equipment and secretaries in the conduct of their political activities; and (iii) other adverse matters. White recognizes that the administrative regulations were never fully adopted by the Dougherty County Board of Education but contends that the Board should have rescinded or modified the same. Why should it be necessary for the board to rescind or modify such regulations? The Board charges the administrative staff with the duty of administering the day by day functions of the school

system. It was necessary that such regulations be put into effect and it is really immaterial whether they were promulgated by the staff or by the Board. Does the Voting Rights Act require the Board to get the approval of the Attorney General of the United States before it can prohibit their legislators from using school secretaries, school material, school supplies, school telephones and school time in connection with his legislative functions? We think not!

The question in this case is whether or not the Board has adopted a policy that explicitly and directly burdens the electoral process. The record in this case is clear that it has not. The Board lets it be known to all contract personnel that they are expected to fulfill their contracts in their entirety. Surely this does not burden the electoral process. The Board has acted upon requests for leaves of absence on an individual basis, has approved some and denied some. The fact that a request for leave of absence is related to the applicant's holding of a political office, does not ipso facto make the Board's decision denying the leave of absence in the interest of the proper administration of the school system, a rule or policy that implicitly and directly burdens the political process. White, supra, states, "Rule 58 is not a neutral personnel practice covering all forms of absenteeism. Rather, it specifically addresses the electoral process, singling out candidacy for elective office as a disabling activity." Such is not the situation here involved.

Basically, what is involved in this case is whether or not Mr. White has any obligations to honor a contract he entered into with the Dougherty County Board of Education. Mr. White had a twelve month contract which called for him to devote time and energy to the affairs of the school system. The evidence is that by being granted an unpaid leave of absence to attend to his legislative func-

tions, he was absent from his school duties approximately one-fourth of the time. It takes no crystal ball to determine that the school system can only be harmed by one of its employees being away for such a period of time. The Board considered this and in 1980, denied Mr. White's request, not because of any policy, but because of the effect his absences had upon the school system.

We have read and re-read the Voting Rights Act of 1965 and nowhere therein do we find any intimation that an employee of a covered entity has any right to demand and be granted a leave of absence to serve in an elected position. Appellant takes the position that he has an absolute right to be granted a leave of absence from his contractual position with the Dougherty County Board of Education in order to serve in an elected position. Appellant has not been denied the right to serve in his elected capacity, but he has been and is expected to honor his contract with the Board. As a matter of fact, Appellant, without being granted a leave of absence, served in the 1981, 1982 and 1983 sessions of the Georgia General Assembly.

In 1978, the Dougherty County Board of Education had three employees seeking leaves of absence for the purpose of being away from their position to serve in elected capacities. Mr. John White was a counselor at a vocational school and an elected member of the Georgia General Assembly. Mrs. Lillian Parkman was a principal at an elementary school and an elected member of the Georgia General Assembly. Mr. Don Cutler was a classroom teacher and an elected member of the Board of Commissioners of Dougherty County, Georgia. All three of the aforementioned parties had contracts with the Dougherty County Board of Education, and the Board in its wisdom granted them leaves to serve in their elected posi-

tions under the understanding that the question of leave would be reconsidered after two years' study of the effect their absences had upon the school system—a counselor being away from his duties 25% of the time; a principal of an elementary school being away from her duties at least 25% of the time; a classroom teacher being away from his duties a great portion of his time—the Board determined that such absences were not in the best interest of the school system and declined to grant Mr. White's further request for leave. Such denial was not based upon political factors but was based upon the Board's obligation to provide quality education in the community over which it had jurisdiction.

CONCLUSION

It is respectfully submitted that that majority decision of the District Court is immanently correct and no substantial question for decision by this Court is presented. Therefore, the judgment of the District Court should be affirmed.

Respectfully submitted,

JESSE W. WALTERS
PERRY, WALTERS & LIPPITT
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion to affirm has been served upon John R. Myer, 1515 Healey Building, Atlanta, Georgia 30303, counsel of record for appellant by mailing a copy of said motion to him, first class postage prepaid, addressed as above.

This 27th day of August, 1984.

Jesse W. Walters

JESSE W. WALTERS
Attorney for Appellees

(3)

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No. 83-1868

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN E. WHITE, APPELLANT

v.

DOUGHERTY COUNTY BOARD OF EDUCATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a decision by appellee Board of Education not to grant employees unpaid leave to perform the duties of elective office after April 1980 constituted "enact[ment]" of a standard, practice, or procedure "different from that in force or effect on November 1, 1964," within the meaning of Section 5 of the Voting Rights Act.

2. If so, whether the Board's policy constituted a standard, practice or procedure "with respect to voting," within the meaning of Section 5 of the Voting Rights Act.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINION BELOW

The opinion of the three judge district court (J.S. App. A1-A72) is reported at 579 F. Supp. 1480.

JURISDICTION

The judgment of the three judge district court (J.S. App. A73) was entered on February 13, 1984. On March 1, 1984, the district court denied a motion to alter or amend (J.S. App. A74-A75). The notice of appeal (J.S. App. A76) was filed on March 14, 1984, and the jurisdictional statement was filed on May 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973c.

STATEMENT

1. The earlier history of this dispute is recounted in *Dougherty County Board of Education* v. *White (White I)*, 439 U.S. 32, 34-36 (1978). In May 1972, appellant, a vocational counselor employed on a 12-month basis by appellee Dougherty County Board of Education, announced his candidacy for the Georgia House of Representatives. He was apparently the first black person in recent memory to run for this office from Dougherty County, as well as the first employee of the Board ever to run for public office. Less than a month later, the Board adopted a rule ("Rule 58") requiring employees to take an unpaid leave of absence during any period in which they are a candidate for public office and during their period of service, if elected. The Board did not submit Rule 58 to the Attorney General or the District Court for the District of Columbia for preclearance under 42 U.S.C. 1973c. In *White I*, this Court held that "Rule 58 is a standard, practice, or procedure with respect to voting enacted by an entity subject to § 5" and affirmed a district court order enjoining its implementation (439 U.S. at 47). The Board rescinded Rule 58 on April 11, 1977 (J.S. App. A8).

Prior to 1972, the Board had no special policy regarding leaves for political purposes. The Board allowed employees to be absent, with pay, for jury duty, vacation (ten days per year), personal leave (three days per year), sick leave, military leave, and maternity leave (J.S. App. A7-A8). Appellant's contract provided that his "annual salary shall be subject to an adjustment on a pro-rata basis for the number of days the employee does not work . . . due to employee's absence when there is no accumulative leave to cover such absence" (*id.* at A6-A7 (ellipses in original)).

Appellant was elected to the Georgia House in 1974, and has been reelected every two years since then. Pursuant to Rule 58, while it was in effect, appellant took an unpaid leave of absence during the legislative sessions in 1975, 1976, and 1977. After Rule 58 had been enjoined and rescinded, appellant requested and received permission to take an unpaid leave of absence to attend the 1978 legislative session.

In 1978, two other employees of the Board, Lillian Parkman and Don Cutler (a teacher and a principal), ran for and were elected to public office (J.S. App. A10). That year, the Board adopted the following policy, entitled "WORK SCHEDULE" (*id.* at A9):

> It shall be the policy of the Dougherty County School Board that each employee fulfill his/her contract in its entirety. That is, each ten (10) month employee shall fulfill his/her contract during the regular academic school year (August-June).
>
> * * * * *
>
> Twelve (12) month employees will be expected to work the entire twelve months except for vacation time.

After his reelection in November 1978, appellant requested the Board to allow him to be absent without pay during the 1979 and 1980 legislative sessions. The Board met on November 20, 1978, voted to "reaffirm its position concerning employees fulfilling their contracts in their entirety," and directed the Superintendant to notify appellant, Parkman, and Cutler of the decision. J.S. App. A9-A10. The three employees were invited to meet with the Board to discuss how they could perform their work responsibilities and also serve in their elected offices. At that meeting, on December 20, 1978, the Board agreed to

allow the employees unpaid leaves of absence for their political service for two years, during which time a study would be made of the effect of their absences on their job performance. The question would then be reconsidered in light of the study. J.S. App. A10-A11.[1]

On April 15, 1980, the Board revisited the question. The Superintendant reported that the two-year study showed that appellant's absences from work had an adverse effect on his job performance, and recommended that further requests for leaves of absence of this sort be denied. The Board adopted this recommendation by a vote of five to one. On November 26, 1980, appellant requested an unpaid leave of absence to attend the 1981 legislative session; this request was denied. J.S. App. A11-A12. Since that time, the Board has continued to deny appellant's requests for leave (J.S. App. A16).

Appellant has continued to serve in the Georgia House, using his personal leave and vacation time and limiting his appearances to the most essential portions of the sessions. J.S. App. A12, A16. The legislative sessions last 40 days, and take place in January, February, and March of each year. Appellant estimates that, if he were granted leave without pay, he would be absent approximately 45 school days each year (J.S. App. A16). This would constitute approximately 21% of the work year—28% if vacation and personal leave were figured in (J.S. App. A17).

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[1] The Superintendant promulgated administrative regulations to govern these leaves of absence, requiring the employees to give at least three days notice and obtain approval in advance. J.S. App. A11.

2. On March 10, 1981, appellant filed this action in the United States District Court for the Middle District of Georgia, alleging that the Board's policy of denying unpaid leaves of absence for service as an elected official constituted enactment of a "standard, practice, or procedure with respect to voting different from that in force on November 1, 1964," and thus that the policy should have been submitted for preclearance to the Attorney General or the United States District Court for the District of Columbia, as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.[2] The three judge district court held, in a divided opinion, that "this board's refusal to alter its neutral personnel policies to accommodate this employee elected officeholder does not possibly constitute a Section 5 'standard, practice or procedure'" (J.S. App. A47). The court thus found it "unnecessary to consider whether or not the conduct of the defendant board was 'with respect to voting'" (*id.* at A49).

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[2] Earlier, on December 31, 1980, appellant's counsel wrote the Chief of the Voting Section of the Civil Rights Division of the Department of Justice to inquire whether the Board had "submitted any regulations concerning political leave," and informing him that the Board had denied appellant leave "on the basis of a subsequent rule." See App., *infra*, 1a. On February 11, 1981, the Acting Assistant Attorney General wrote to the Board, stating that "[i]t has come to our attention that the Dougherty County Board of Education may have changed its policy on political leaves of absence" and requesting the Board to submit "this apparent change" for preclearance under the Act. App., *infra*, 2a. In subsequent communications, the Board denied that it had any policy on political leaves of absence (App., *infra*, 4a-5a, 8a-9a) and the Department of Justice took the position, based on the information then available to it, that the policy should be submitted for preclearance. App., *infra*, 6a-7a, 10a-11a.

ARGUMENT

Personnel practices of government employers, if directed at participation in the political process, can have a significant effect on the ability of potential minority candidates to hold themselves out for public office, and thus on the range of choices available to voters. As we pointed out in our brief as amicus curiae in *White I* (at 17-18), where black candidates are significantly more likely than white candidates to be drawn from the ranks of public employees—as census data from Georgia tended to bear out—a provision imposing a special burden on candidacy or officeholding by public employees "may place blacks at a substantial competitive disadvantage in seeking elective office and may seriously diminish citizens' opportunities to vote for black candidates." It was on this basis that the Court held, in *White I*, that a personnel rule requiring public employees who run for office to take an unpaid leave of absence, whether or not their candidacy would otherwise interfere with their performance of work responsibilities, was the functional equivalent of a filing fee and thus subject to preclearance under Section 5 of the Voting Rights Act.

This case potentially raises a question beyond that resolved by *White*: whether refusal to grant a special accommodation to the need of officeholders to be absent from work for a substantial percentage of the work year is a standard, practice, or procedure "with respect to voting" within the meaning of Section 5. This question was not reached by the three judge district court because the court found that appellant's claim was foreclosed on another ground: the Board's current practice does not reflect a "standard, practice, or procedure * * * different from that in force or

effect on November 1, 1964" (42 U.S.C. 1973c). In effect, the district court held that the Board has followed the same "standard, practice, or procedure" with respect to unpaid leaves of absence for elected officeholders since before enactment of the Voting Rights Act, with the exception of the period between 1972 and 1977, when Rule 58 was unlawfully in effect. Therefore, according to the district court, there was no need for the Board to submit its current "policy" for preclearance—whether or not it would be considered a "standard, practice, or procedure with respect to voting" within the meaning of Section 5.

We submit that this holding of the district court reflects a reasonable interpretation of the facts and raises no significant question of law. Accordingly, this Court should summarily affirm.

1. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, requires preclearance whenever a covered state or political subdivision "shall enact or seek to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." [3] The effect of this provision is that "elections may be held either under electoral rules in effect on November 1, 1964, or under rules adopted since that time that have been properly precleared." *City of Rome* v. *United States*, 446 U.S. 156, 182 (1980).[4]

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[3] For jurisdictions subjected to Section 5 on dates later than November 1, 1964, a change in voting procedures is judged against the procedures in effect on the jurisdiction's coverage date. 28 C.F.R. 51.2(d). For convenience, we will refer to November 1, 1964 as the benchmark date, without qualification.

[4] Once a voting procedure has lawfully been precleared and implemented, it has been held that the jurisdiction must ob-

If a jurisdiction submits a voting change to the Attorney General and the Attorney General enters an objection, the jurisdiction is precluded from enforcing the change unless it obtains a declaratory judgment in its favor from the United States District Court for the District of Columbia. The lack of preclearance effectively reinstates, by operation of law, the last policy or practice that was valid under Section 5, *i.e.*, the last precleared policy, if any, or that in effect on November 1, 1964. See *City of Rome* v. *United States*, 446 U.S. at 182-183 ("[w]hen the Attorney General refused to preclear the city's electoral changes, the city had the authority to conduct elections under its electoral scheme in effect on November 1, 1964"); *Terrazas* v. *Clements*, 537 F. Supp. 514, 523-524 (N.D. Tex. 1982) (three-judge court); *Graves* v. *Barnes*, 408 F. Supp. 1050, 1052 (W.D. Tex. 1976) (three judge court).

Similarly, if a jurisdiction fails to submit a voting change to the Attorney General for preclearance under Section 5 or to the District Court for the District of Columbia in a declaratory judgment action, it is precluded from enforcing the change. *Connor* v. *Waller*, 421 U.S. 656 (1975). Either the Attorney General or an aggrieved citizen may bring suit to enjoin its enforcement. *Allen* v. *State Board of Elections*, 393 U.S. 544, 554-557 (1969). In such a suit,

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tain preclearance if it decides to deviate from that procedure—even if it would return to the procedure in effect on November 1, 1964. *Dotson* v. *City of Indianola*, 521 F. Supp. 934, 943 (N.D. Miss. 1981) (three judge court), aff'd summarily, 456 U.S. 1002 (1982); *NAACP* v. *Georgia*, 494 F. Supp. 668, 677-679 (N.D. Ga. 1980) (three judge court). This ensures that any change from a lawful, enforceable, voting practice will receive Section 5 scrutiny.

the court's authority is limited to determining whether the unprecleared procedure was subject to Section 5 coverage. 393 U.S. at 555-556 n.19, 558-559, 561; see *Perkins* v. *Matthews*, 400 U.S. 379, 383-387 (1971). While in some circumstances, the court has the remedial discretion to order new elections, it would ordinarily "enter an order affording local officials an opportunity to seek federal approval" (*Perkins*, 400 U.S. at 396). "[I]f local officials fail to do so or if the required federal approval is not forthcoming," the court then might order new elections under prior, valid, procedures. *Id.* at 396-397; see *Berry* v. *Doles*, 438 U.S. 190 (1978). In effect, the jurisdiction has two options: to seek preclearance [5] or to return to prior, valid, procedures (and to conduct new elections, if necessary and ordered to do so).[6]

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[5] Of course, the jurisdiction may seek preclearance of a modified procedure if it chooses, or if a modified procedure is more likely to be approved.

[6] In *City of Pleasant Grove* v. *United States*, Civil Action No. 80-2589 (D.D.C. Oct. 7, 1981), the City attempted to obtain court approval of some, but not all, of certain already implemented annexations; it declared that it would simply "cease[] enforcing" the annexation it chose not to submit with the rest. The government took the position that the City was required to submit all of the effectuated annexations as "a single and unified whole" (see *City of Rome* v. *United States*, 472 F. Supp. 221, 247 (D. D.C. 1979), aff'd, 446 U.S. 156, 186 (1980)). Under these circumstances, the court held that "[i]t would completely contradict the purpose of the Voting Rights Act if a state or municipality were allowed to enforce a voting change without preclearance and then to escape an otherwise mandatory preclearance requirement simply by stating that it would no longer enforce that change." The court did not suggest that the City would not have had the discretion to rescind the entire group of annexations, if it chose, rather than submitting them for preclearance.

It follows that, when a jurisdiction has implemented a voting procedure without obtaining preclearance, and this comes to the jurisdiction's attention, it has the "opportunity" (*Perkins*, 400 U.S. at 396) to seek federal approval of the change; or, in the alternative, it may rescind the change and return to its last valid voting procedure. In other words, if a violation of Section 5 is discovered, the jurisdiction has the same options available to it as it would have if it were sued, and lost, in an action before a three judge district court. The decision of such a jurisdiction to return to a prior, valid, voting procedure would not itself require preclearance.

In cases where a jurisdiction had unlawfully implemented changes with respect to voting in the past without obtaining preclearance, but later rescinded those changes, the question becomes whether its present procedure (after rescission) is a change from the last procedure that was valid under Section 5—*i.e.*, its last prior precleared procedure, if any, or the procedure in effect on November 1, 1964. As it pertains to the circumstances of this case, the question is whether the Board's current policy with regard to unpaid leaves of absence for elective officeholders is a change from the last such policy that was valid under Section 5. Since the Board has never obtained preclearance for any policy regarding leaves of absence, the last valid policy was that in effect on November 1, 1964—a policy that continued until the unlawful adoption of Rule 58 in 1972. The question, therefore, is whether the Board's current policy (which rescinds the unprecleared and therefore unlawful policy of Rule 58) represents a change from that pre-1972 policy.

Appellant asks and answers another question. He contends (J.S. 22) that because "the Board authorized

by policy and practice political leaves of absence for the eight year period from 1972 until 1980," the Board's 1980 decision "to end the eight year practice" was an electoral change requiring preclearance. The flaw in this argument is that the practice adopted in 1972—Rule 58—was not precleared; at appellant's own instigation, that practice was enjoined in *White I* and then rescinded.[7] Nor were the decisions to grant unpaid leaves of absence for the 1978, 1979, and 1980 legislative sessions precleared (which they would have had to be if they constituted a "standard, practice, or procedure"). The question in this case does not depend, therefore, on whether the Board's current practice constitutes a change from that in effect between 1972 and 1980, but on whether it constitutes a change from that in effect between 1964 and the unlawful adoption of Rule 58 in 1972.

It is undisputed that in 1964 (and until 1972) the Board had no special policy concerning political leaves of absence (J.S. 18; Mot. to Aff. 5). After rescission of Rule 58 in 1977, appellant requested and was permitted to take an unpaid leave of absence to attend the 1978 legislative session. The district court found (J.S. App. A39-A40) that this "decision pertained only to Mr. White and his absence for that particular session; it thus did not constitute a 'standard, prac-

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[7] As the district court correctly stated (J.S. App. A32-A33):

> In determining whether or not any such standard, practice, or procedure was adopted, Rule 58, because it was found to be in violation of the Voting Rights Act and as a matter of law never in effect, see *Terrazas v. Clements*, 537 F.Supp. 514, 520 (D.C. Tex. 1982), cannot be taken into consideration. The earlier litigation between these parties "wiped [Rule 58] from the books" as if it never existed.

tice, or procedure pertaining to employee absence. It was nothing more than an individual personnel decision.' " This accords with our enforcement policy to the effect that individual personnel decisions regarding political participation by public employees do not constitute a "standard, practice, or procedure." But even if the individual grant of leave had constituted a "standard, practice, or procedure," it was not precleared and thus must be considered a legal nullity. *NAACP* v. *Hampton County Election Comm'n*, No. 83-1015 (Feb. 27, 1985), slip op. 8 n.19; *Connor* v. *Waller*, *supra*.

In 1978, the Board again granted a request for unpaid leave of absence for appellant, and also for newly-elected officeholders Parkman and Cutler, on an experimental basis. The district court found (J.S. App. A42) that this decision, too, "was nothing more than three individual personnel decisions." These decisions stand on the same footing as the 1978 decision.

The key question is the nature of the Board's practice since 1980. The district court noted (J.S. App. A43) that "[w]hile the defendant board labeled [its April 1980] decision as one establishing a policy on political leave, the board in reality decided not to allow its employees who are elected to public office greater time away from the job than they and all other employees are otherwise allowed." [8] Moreover,

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[8] The district court's reference to the Board having "labeled [its] decision as one establishing a policy on political leave" (J.S. App. A43) is based on the Board's adoption of a motion on April 15, 1980, stating "that no leaves of absence be granted to personnel of the Dougherty County School System for political purposes" (J.S. 9). In context, the district court reasonably concluded that this motion merely reflected the Board's decision *not* to adopt a special policy permitting

the district court found (*id.* at A43-A44) that the Board has continued to consider requests for unpaid leaves of absence on an individual, case-by-case basis.[9] The court concluded (*id.* at A45):

> [T]he board's April 1980, action constituted nothing more than its refusal to adopt a legislative leave policy and served in effect as a reaffirmation of its policy requiring employees to fulfill their contracts with the exception of time away from the job allowed to all.

Accepting for purposes of appellate review the district court's factual conclusion that the Board's 1980 decision (which remains the basis for its current practice) was "nothing more than [a] refusal to adopt a legislative leave policy" and that employees seeking leave for purposes of serving in elective office are treated in the same manner as are any other

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political leaves. Not adopting a special policy permitting political leaves is quite a different matter from adopting a special policy against granting political leaves.

[9] Appellant relies heavily (J.S. 19-20) on the following statement elsewhere in the district court's opinion (J.A. App. A17-A18):

> It is thus the policy and practice of the defendant board of education to deny its employees requests for leaves of absence without pay to attend to the duties of elective office and in so doing to require its employees holding elective office to abide by the same leave policies that are applicable to all employees.

Any apparent inconsistency between this statement and those at J.S. App. A43-A44, discussed in text, is easily resolved. The Board has not adopted any policy regarding unpaid leaves of absence for elective officeholders different from that for other unpaid leaves of absence. The general policy is that employees must fulfill their contracts; exceptions, if any, are made on an individual basis.

employees seeking unpaid leave,[10] it follows, as the district court held, that there has been no change from the policy in effect from 1964 through 1972.

The point may be illustrated by asking what policy or practice would be reinstated if a court found that the current practice is in violation of Section 5. If the current practice—no legislative leave policy; treatment of legislative leave in the same manner as any other unpaid leave request—is held unlawful and enjoined, what is the Board required to do? It cannot return to Rule 58, because that policy has already been enjoined and rescinded. It cannot return to the practice followed between 1977 and 1980, because that practice was never precleared. Its only option is to return to the practice in effect on November 1, 1964—*i.e.*, no legislative leave policy; presumed treatment of legislative leave in the same manner as any other unpaid leave request.

Appellant cannot have it both ways. Rule 58, adopted in 1972, was disadvantageous to him in some respects (it required him to take an unpaid leave of

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[10] We recognize that Judge Anderson, in dissent, expressed his view that the court's factual conclusion on this point "has a very weak support in the evidence" (J.S. App. A58) and "requires a strained interpretation of the evidence" (J.S. App. A62). However, for purposes of appellate review, the district court's factual findings must govern consideration of the case unless they are clearly erroneous. We do not understand that to be appellant's argument.

Judge Anderson's further argument—that, even assuming the court's factual conclusions to be correct, there was nonetheless a change requiring preclearance—rests entirely on a comparison of the current practice with that in effect between 1977 and 1980 (and perhaps 1972-1977 as well). J.S. App. A66. As explained at pages 10-11, *supra*, that is not the correct benchmark for comparison.

absence during his political campaigns) and advantageous to him in other respects (it effectively guaranteed him unpaid leave during legislative sessions). Having successfully obtained invalidation and rescission of Rule 58 in 1977, appellant is not in a position to complain that the Board's "decision * * * to end the eight year practice it had permitted" (J.S. 22) was unlawful—but only with regard to the aspect of Rule 58 that benefitted him. As appellant himself recognizes (*id.* at 28), the "substantive merits" of a political subdivision's practice—whether it benefits minority candidates or voters—is not determinative of the question of coverage.

Appellant's principal legal argument (J.S. 24-28) is that the decision below conflicts with *Perkins* v. *Matthews, supra.* In *Perkins,* this Court held, inter alia, that a challenged voting policy must be evaluated against the procedure that was *in fact* in force or effect on November 1, 1964, and not the procedure that theoretically should have been in effect. 400 U.S. at 394-395. Appellant contends (J.S. 26) that "this *Perkins* rule supports his position and warrants reversal." He reasons that in 1964, the Board did not have a policy regarding political leaves of absence, but that "had the question been posed prior to November 1, 1964, the Board would have adopted a policy permitting leaves (as it did with Rule 58 in 1972)" (J.S. 27).

This argument is without merit. *Perkins* stands for the proposition that in the "peculiar context" where one procedure was required by law on November 1, 1964, but another procedure was actually followed in the elections immediately before and after November 1, 1964, the procedure that was actually used should be deemed the procedure "in force and effect" at that time. Here, there is no dispute over

what policy was in force or effect in 1964; the only issue is whether the present policy represents a change. The district court found that there has been no change, and nothing in *Perkins* suggests that the facts as found must bear another interpretation.

Indeed, appellant's argument is inconsistent with his own argument, and this Court's holding, in *White I*. There, appellant argued and this Court held that Rule 58 was a change from the policy in effect in 1964. Appellant is therefore foreclosed from arguing in this case that the district court should have concluded that "in fact" Rule 58 was already in force or effect in 1964.

The decision below thus raises no significant question of law. While the factual question—whether the present policy is the same as that in effect in 1964—is open to honest disagreement (as the dissenting opinion demonstrates), that question has been satisfactorily and reasonably resolved by the district court. Appellant's position rests, in essence, on a comparison between the present policy and either the unprecleared policy in effect in 1972-1980 or a speculative policy (the same as that adopted in 1972) that might have been adopted by the Board in 1964 if the issue had been raised. Neither such comparison has any support in the law.[11]

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[11] We have reproduced in an appendix to this brief three letters from the Acting Assistant Attorney General to the Board, requesting the Board to submit for Section 5 review the policy at issue in this litigation. We have also reproduced two letters from the Board in response, and one letter from appellant's counsel to the Voting Section. These letters, together with a newspaper clipping provided by appellant, constituted the principal factual basis for the government's request to the Board. It is our practice, when informed of a matter that might require Section 5 review, to request a sub-

2. If this Court should conclude that the Board's current policy on unpaid leaves of absence for elective officeholders reflects a "standard, practice, or procedure * * * different from that in force or effect on November 1, 1964" (42 U.S.C. 1973c), it will be necessary to consider whether that policy is one "with respect to voting" (*ibid.*). The district court did not reach that issue (J.S. App. A49).

In *White I*, this Court held that a rule requiring public employees to take an unpaid leave of absence during the period of their candidacy for elective office is a "standard, practice, or procedure with respect to voting" within the meaning of Section 5. The Court noted (439 U.S. at 42) that the Board "made its mandatory leave-of-absence requirement contingent on candidacy rather than on absence during working hours." The rule was not a neutral policy regarding abstenteeism (*id.* at 42-43 n.12); rather, it "specifically addresse[d] the electoral process, singling out candidacy for elective office as a disabling activity" (*id.* at 40). The rule therefore "operate[d] in precisely the same fashion" as a filing fee. "By imposing substantial economic disincentives on employees who wish to seek elective office, the Rule burdens entry into elective campaigns and, concomitantly, limits the choices available to Dougherty County voters." *Ibid.*

Application of Section 5 to the employment practice

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mission or further information that would clarify the question of coverage. In this instance, the Board did not provide the full explanation of the nature of its political leave policy and its historical context, as was later supplied to the district court. In light of the fuller information subsequently available to the district court, we do not believe that the court's decision not to defer to the Department's preliminary conclusion as to probable coverage constitutes ground for reversal.

at issue here would require a considerable extension of the holding of *White I*. Indeed, footnote 12 of the Court's opinion in *White I* suggests that a policy treating political leaves of absence in the same manner as any other unpaid leave request would not require preclearance (439 U.S. at 42-43 n.12 (citations omitted)):

> Insofar as the Board is concerned about its employees' failure to discharge their contractual obligations while standing for office, it has a variety of means to vindicate its interest. The Board may, for example, prescribe regulations governing absenteeism, or may terminate or suspend the contracts of employees who willfully neglect their professional responsibilities. What it may not do is adopt a rule that explicitly and directly burdens the electoral process without preclearance.

As construed by the district court (J.S. App. A46), the Board's present practice is based on "neutral personnel policies and practices governing all forms of absenteeism. The defendant board has simply refused to alter those neutral policies and practices." Accepting that factual predicate for this case, it seems clear that the rationale of *White I* does not extend to this case. Accordingly, even if the Court were to conclude that the Board's current practice reflects a change from that in effect on November 1, 1964, it could affirm the decision below on that alternative ground.

CONCLUSION

The judgment of the three judge district court should be summarily affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES FRIED
Deputy Solicitor General

CHARLES J. COOPER
Deputy Assistant Attorney General

MICHAEL W. MCCONNELL
Assistant to the Solicitor General

MARCH 1985

APPENDIX

December 31, 1980

Gerald W. Jones, Esq.
Chief, Voting Section
Civil Rights Division
United States Department of Justice
Washington, D.C. 20530

RE: *John White v. Dougherty County, Georgia Board of Education II*

Dear Mr. Jones:

My client John White has recently been denied a political leave of absence by the Dougherty County Board of Education. I enclose for your information my letter to the Board's attorney, Jesse W. Walters, Esq.

I would appreciate your advising me whether in fact the Dougherty County Board of Education has submitted any regulations concerning political leave. In the first lawsuit, of course, their discarded Rule 58 was enjoined. They have denied White leave this time on the basis of a subsequent rule. Prior to initiating any new litigation I do need to know whether they have submitted anything or received approval.

Also, I would appreciate any inquiry your Department might deem appropriate of the Board concerning their apparent non-compliance again with Section 5.

If you have any questions, please give me a call.

Very truly yours,

/s/ John R. Myer
JOHN R. MYER

Feb. 11, 1981

Jesse W. Walters, Esq.
Perry, Walters, Lippitt & Custer
409 North Jackson Street
P.O. Box 527
Albany, Georgia 31703

Dear Mr. Walters:

It has come to our attention that the Dougherty County Board of Education may have changed its policy on political leaves of absence for employees of the school system.

Our records fail to show that this possible change affecting voting has been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act of 1965, as amended. It is necessary that a change either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that the change does not have the purpose and will not have the effect of discrimination on account of race, color or membership in a language minority group. Changes in procedure which affect voting are unenforceable unless and until the Section 5 preclearance requirements have been met.

Should you elect to submit this apparent change to the Attorney General, please follow the procedures set forth in the enclosed Procedures for the Administration of Section 5. In addition, please provide us with a description of the practices or policies which have been in effect concerning granting, or not granting, leaves of absence, with or without pay, etc., since No-

vember 1, 1964, for political activity by employees of the Board of Education.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us what course of action the Dougherty County Board of Education plans to take with respect to this matter. If you have any questions concerning this letter, please feel free to call Ms. Hallue Wright (202-724-7170) of our staff, who has been assigned to handle this submission. Please refer to File No. D6455 in any written response to this letter so that your correspondence will be properly channeled.

Sincerely,

JAMES P. TURNER
Acting Assistant Attorney General
Civil Rights Division

By:

GERALD W. JONES
Chief, Voting Section

PERRY, WALTERS, LIPPITT & CUSTER
Attorneys at Law
409 North Jackson Street
Post Office Box 527
Albany, Georgia 31703

February 18, 1981

Mr. James P. Turner
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20530

Re: JPT:CWG:HEW:gml
DJ 166-012-3
D6455

Dear Mr. Turner:

Yours of February 11, 1981 wherein you advise it has come to your attention that the Dougherty County Board of Education may have changed its policy on political leaves of absence for employees of the school system acknowledged.

The Dougherty County Board of Education has no policy on political leaves of absence for employees of the school system. Personnel who are under contract with the Dougherty County School System are expected to fulfill their contracts and give to the school system their full attention and energies. This applies to all contract personnel.

The Dougherty County School System did have a rule at one time pertaining to leaves of absence for political candidates. However, the Supreme Court of the United States in the case of *Dougherty County*

Board of Education v. White, 439 US 32, 58 LEd 269, 99 SCt. 368 (1978) held that such rule was in violation of Section 5 of the Voting Rights Act of 1965. Since and prior to that date the Dougherty County School System has had no policy regarding political leaves of absence for employees of the school system. All employees are dealt with in the same fashion concerning leaves of absence.

I will be happy to provide you with any further information you need concerning this matter.

Sincerely,

/s/ Jesse W. Walters
JESSE W. WALTERS

Apr. 23, 1981

Jesse W. Walters, Esq.
Perry, Walters, Lippitt & Custer
409 North Jackson Street
P.O. Box 527
Albany, Georgia 31703

Dear Mr. Walters:

This is in response to your letter of February 18, 1981, concerning Dougherty County Board of Education policy on political leaves of absence for employees of the school system.

Although you state that the Dougherty County school system has had no policy regarding political leaves of absence for its employees, information coming to our attention suggests that a change within the meaning of Section 5 may have occurred. For example, an article in *The Albany Herald* on Wednesday, April 23, 1980, stated that "the Dougherty County Board of Education voted 5 to 1 not to grant 'any leave of absence to its personnel for political purposes'." Previously, it is our understanding that the board granted unpaid leaves of absence; thus it is our opinion that a change in procedure has taken place.

As we indicated in our February 11, 1981, letter to you, any change in voting practices or procedures must be submitted for review under Section 5 to the Attorney General or to the United States District Court for the District of Columbia. See *Perkins* v. *Matthews*, 400 U.S. 379 (1971), and *City of Rome* v. *United States*, 466 U.S. 156 (1980).

Should you elect to submit this change to the Attorney General, please follow the procedures set forth in the enclosed Procedures for the Administration of

Section 5 (Section 51.18 *et seq.*, 46 Fed. Reg. 875-876).

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us within ten days of your receipt of this letter what course of action the Dougherty County Board of Education plans to take with respect to this matter. If you have any questions concerning this letter, please feel free to call Hallue Wright (202-724-7170) of our staff, who has been assigned to handle this submission. Please refer to File No. D6455 in any written response to this letter so that your correspondence will be properly channeled.

Sincerely,

JAMES P. TURNER
Acting Assistant Attorney General
Civil Rights Division

By:

GERALD W. JONES
Chief, Voting Section

PERRY, WALTERS, LIPPITT & CUSTER
Attorneys at Law
409 North Jackson Street
Post Office Box 527
Albany, Georgia 31703

April 27, 1981

Mr. James P. Turner
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20530

Re: JPT:CWG:HEW:spk
DJ 166-012-3
File D6455

Dear Mr. Turner:

Yours of April 23, 1981 concerning the contention that the Dougherty County Board of Education may have made a change in voting practices or procedures falling within the purview of Section 5 of the Voting Rights Act of 1965 acknowledged.

You refer to an article appearing on Wednesday, April 23, 1980 in The Albany Herald as information you rely upon concerning the contention that there has been a change in voting practices or procedures. This article apparently stated "the Dougherty County Board of Education voted 5 to 1 not to grant 'any leave of absence to its personnel for political purposes.'" You advise that it is your understanding that previously the board granted unpaid leaves of absence, thus your opinion that a change in procedures had taken place.

The policy of the Dougherty County Board of Education (Rule 58) pertaining to political leave was held to be in violation of Section 5 of the Voting Rights Act of 1965 by the Supreme Court of the United States in the case of *Dougherty County Board of Education v. White*, 439 U.S. 32, 58 LEd 269, 99 SCt. 368 (1978). Prior to Rule 58 the Dougherty County Board of Education had no policy with regard to political leaves and clearly the Supreme Court eliminated Rule 58 as a policy of the Dougherty County Board of Education.

All contract employees of the Dougherty County School System are expected to fulfill their contracts. All parties executing contracts are so advised. Between the time of the decision of the Supreme Court and the present, there have been requests from contract personnel for leaves of absence for specified reasons, including political leaves. Some have been granted and some have been denied. However, as stated above, the only policy the Dougherty County Board of Education has concerning leaves is that all contract personnel are expected to comply with the provisions of their contract. I can not believe that such expectations are contrary to the provisions of the Voting Rights Act of 1965.

I will be happy to provide you with any further information you desire or I will be happy to discuss this matter with you at any time.

Sincerely,

/s/ Jesse W. Walters
JESSE W. WALTERS

June 30, 1981

Jesse W. Walters, Esq.
Perry, Walters, Lippitt & Custer
409 North Jackson Street
P.O. Box 527
Albany, Georgia 31703

Dear Mr. Walters:

This is in response to your letter of April 27, 1981, in which you indicated that the Dougherty County Board of Education position is that it need not submit its policy regarding political leaves of absence for review pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. For the reasons stated in our letters to you of February 11, 1981, and April 23, 1981, we continue to believe that the changes in the board's treatment of political leave requests are subject to the preclearance requirements of Section 5. Thus, we again request that you submit for Section 5 review the board's standards, practices and procedures regarding the granting of leave for political purposes.

If you have any questions concerning this matter, please feel free to call Ms. Hallue Wright (202-724-7170), who has been assigned to handle this submission. Please refer to File No. D6455 in any written correspondence so that your letter will be properly channeled.

In view of the pending litigation on this matter in the United States District Court for the Middle District of Georgia, we are providing copies of this letter to the court and to all counsel of record.

Sincerely,

JAMES P. TURNER
Acting Assistant Attorney
General
Civil Rights Division

By:

GERALD W. JONES
Chief, Voting Section

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ALEXANDER L. STEVAS,
CLERK

NO. 83-1868

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

JOHN E. WHITE,

Appellant

v.

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION: R.H. WARREN, Chairman, MORGAN MURPHY; CHARLES L. NESBITT; FRANKLIN U. CROSS; MRS. CALISTA LANGSTAFF; JAMES H. HALL; MRS. LAURA TRIPLETT, Members of the Dougherty County Board of Education; PAUL ROBERTSON, Superintendent, Individually and in their official capacities,

Appellees

ON APPEAL FROM THE THREE JUDGE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

APPELLANT'S RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE and SUPPLEMENTAL BRIEF

JOHN R. MYER
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Atlanta, GA 30303
404-522-1934

ATTORNEY OF RECORD
FOR APPELLANT

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Certificate of Service

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NO 83-1868

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JOHN E. WHITE, Appellant

vs.

DOUGHERTY COUNTY BOARD OF EDUCATION, et al.

On Appeal From the United States District Court for the Middle District of Georgia

APPELLANT'S RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE and SUPPLEMENTAL BRIEF

Appellant submits this Response to the Brief of the United States as Amicus Curiae (hereinafter "Brief of U.S.") recently filed and this Supplemental Brief to discuss this Court's recent, intervening Section 5 decision, N.A.A.C.P. v. Hampton County Election Commission, No. 83-1015, 52 U.S.L.W. 4207 (February 27, 1985).

I. THE QUESTION OF SECTION 5 "COVERAGE"

The United States takes the position that Section 5 does not apply to the circumstances of this case. The major premise of the Government's position is that summary affirmance is appropriate because the District Court majority below "concluded that the School Board's present policy is the same as that in effect in 1964." (Brief of U.S. at 16; see also at 14). From this premise, the Government argues that because there was no "change", there can be no "coverage" by Section 5. Because this major premise is false both as a factual and a legal matter, even under an approving view of the opinion below, its conclusion of no Section 5 coverage should be rejected.

The factual status of the Board's policies in November, 1964 regarding

political leaves is not in dispute. Below, Appellees admitted the following Request for Admission: "Prior to May, 1972, the Dougherty County Board of Education had no policy concerning political leave for its employees." (First Request to Admit, No. 9). The adoption of Rule 58 in 1972 was the first action taken by the Board concerning political leaves. Prior to 1972, the Board had no policy on political leaves (whether permitting, denying, or considering requests on a case-by-case basis.) Similarly, it is not disputed that from 1972 until the early part of 1980, the Board permitted political leaves. Finally, it is not disputed that since 1980, no political leaves have been permitted, despite requests.

However the post-April, 1980 era is characterized (whether political leaves are considered on a case-by-case basis,

as argued below by Appellees, and as concluded by the majority, or are not permitted leaves as a matter of formal policy and practice, as argued by Appellant and as accepted by the dissent), either of these characterizations represents a "change" from the situation in 1964. As a factual matter, the Government's equating the post-1980 era with the 1964 benchmark date would be correct only if the Board in 1964 had a policy to consider such leaves on a case-by-case basis. Appellees do not so contend nor did the majority so find. Although the Government demolished the strawman it erected, that demolition is irrelevant to the questions before this Court.

The underlying Section 5 coverage question before this Court is whether, in the complicated and unusual circumstances of this case, the undisputed

change between the absence of any policy (affirmative or negative) in 1964 and the Board's post-April, 1980 conduct is within or without the reach of Section 5. Although the Government's opening argument sheds no useful light on this question, this Court's recent decision in Hampton County does--favorably for Appellant. That decision exposes the legal flaws in the Government's major premise as well as errors of law committed by the majority decision.

The majority opinion below adopted a formalistic approach in deciding whether the undisputed change which has occurred here between 1964 and the post-April, 1980 era constituted a "standard, practice, or procedure" within the meaning of Section 5. The majority drew upon Black's Law Dictionary as its primary legal source for making this determination. (J.S. App. A39-42). (In

contrast, Appellant submits, to the dissent which looked to and applied this Court's extensive Section 5 jurisprudence.) The majority, applying the definitions extracted from Black's, concluded that the change was not a "standard, practice or procedure" but instead represented only individual decisions. In evaluating the undisputed fact that from 1978-1980 the Board permitted Appellant and two other employees to take political leave, the majority concluded:

> A "standard, practice, or procedure" being at the least a precedent on which the affected employees and others may rely, the defendant board put those employees on notice that this decision created no precedent by advising that a two-year effect on job performance study would be conducted and the matter reconsidered at the end of that study. No "standard, practice, or procedure" was thus established. It was nothing more than three individual personnel decisions. (J.S. App. A42)

This Court's decision in Hampton County lays to rest any argument that a formalistic approach is appropriate to determine Section 5's coverage questions. This Court there rejected any reading of Section 5 which would limit its applicability only to formally announced, repetitive policies or actions:

> ...Rather, they argue that because the rescheduling in this case was merely an administrative effort to comply with a statute that had already received clearance, it was not a change of such magnitude as to trigger the requirements of Section 5. But plainly, the form of a change in voting procedures cannot determine whether it is within the scope of Section 5. That section reaches informal as well as formal changes,...Neither is it determinative that an alteration in scheduling is unlikely to be repeated, as it would be if it were embodied in a statute or rule. The Voting Rights Act reaches changes that affect even a single election. 53 U.S.L.W. at 4211 (footnotes omitted).

Hampton County, at a minimum[1], confirms Circuit Judge Anderson's dissenting analysis regarding the coverage question even if the policy were only viewed as "case-by-case." (J.S. App. A63-70), and rejects the rigid, legalistic approach of the majority. Measured against the Black's definition, used by the majority below, Hampton County would have come out contrary to the result reached by this Court in that decision.

Hampton County's rejection of a

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[1]Judge Anderson also concluded that the Board's post-April, 1980 actions clearly established that the Board had a clear policy of prohibiting all political leaves, and that such a policy represented a covered change. (J.S. App. A57-63). His dissent pointed out that the majority's resolution of this question to the contrary was "ambiguous." (J.S. App. A57, n.3). This characterization is generous. The Government's Brief struggles with the obvious inconsistencies of the majority's analysis in two separate footnotes. See Brief for U.S. at 12, n. 8; at 13, n.9.

formalistic approach to Section 5 analysis undermines another aspect of the majority's legal analysis. In declining to follow the approach of N.A.A.C.P. v. State of Georgia, 494 F. Supp. 934 (N.D. Ga. 1981) (three judge)[2/], the majority stated that it failed "to perceive how a negative decision can create a 'standard practice or procedure' for anything." (J.S. App. A45)[3/] Hampton County teaches that proper Section 5 analysis is not a

2/ The majority correctly read this voting rights decision as contrary to its own interpretation of Section 5. The United Staes, while citing this decision of the Northern District of Georgia, misreads it. (Brief of U.S. at 8., n.4). N.A.A.C.P. v. State of Georgia, while in direct support of Appellant's position, does not support the Government's proposition regarding changes back from precleared changes because none of the convoluted actions involved in that litigation had been precleared.

3/ The Government's Brief applies a similar formalistic approach: "Not adopting a special policy permitting political leaves is quite a different matter from adopting a special policy against granting political leaves." Brief of U.S. at 13, n.8.

question of labels but is a matter of looking to determine whether there has in fact been any change since 1964 that has not been precleared. Because on the facts here, there has been such a change, Section 5 coverage extends to the facts of this case.[4/]

Rather ironically, the Government asks this Court to summarily affirm even though it concedes[5/] that for at least the period between 1972 and 1982, Appellees unlawfully implemented Section 5

[4/] Appellant would agree that if, in 1964, the Board had had a specific policy prohibiting political leaves and that in 1980 it reconsidered this policy but declined to make a change, that "negative" decision would not fall within Section 5's reach. Such facts are not, however, presented here.

[5/] There is of course no dispute that Rule 58 was improperly implemented for the period of time between 1972-1977. The Brief of the Government also concedes that the leaves permitted between 1977 and 1980 could have been subject to preclearance:

(footnote continued on next page)

changes without seeking the necessary compliance. The very footnote 19 of Justice White's opinion cited by the Government, when read in its entirety, summarizes the continuing recalcitrance of covered jurisdictions to comply with Section 5. To cite footnote 19 in support of the judgment below, as the Government's Brief does, seems to stand that footnote on its head.[6/] Appellant readily acknowledges that the facts in this case are complicated. But, as in

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But even if the individual grant of leave had constituted a "standard, practice, or procedure," it was not precleared and thus must be considered a legal nullity. NAACP v. Hampton County Election Comm'n, No. 83-1015 (Feb. 27, 1985), slip op. 8 n.19; Conner v. Waller, supra. (Brief of U.S. at 12).

[6/] Except for this use of footnote 19 out of its context, the Government's Brief is notable for the failure to cite Hampton County anywhere else.

Hampton County, any dilemmas faced by the Board are "largely of their own making." 53 U.S.L.W. at 4210.

In sum, this Court's Hampton County decision ratifies Circuit Judge Anderson's analysis in every respect. Conversely, that decision is fundamentally at odds with the majority's conclusion that the change between 1964 and post-April, 1980 was not a "change" within the meaning of Section 5.

II. THE "WITH RESPECT TO VOTING" QUESTION

Although the majority did not reach the question of whether the challenged practices were "with respect to voting," the Government argues to this Court that they were not. (Brief of the U.S. at 17-8). Judge Anderson below did reach this question (J.S. App. A71, n.8) and concluded that "The barrier

here, i.e., precluding leave altogether, is as significant as that involved in the previous case, i.e., presenting a financial disincentive to candidacy by requiring leave during the campaign." (J.S. App. A71, n.8). Judge Anderson also cited and relied upon the Attorney General's regulations, 28 C.F.R. 51.12(g), which state that "changes affecting voting" include any changes affecting the ability of anyone to "become or remain holders of elective offices." (J.S. App. A72).

The Brief of the United States conspicuously does not even cite this regulation of the Attorney General, must less offer any response to Judge Anderson's reliance thereon. (Compare the Government's repudiation of the Attorney General's thrice-repeated request to Appellees to submit before implementation any of the changes commencing with

the April, 1980 Board action. (J.S. App. A16, n.11) Appellant respectfully submits that when Judge Anderson's arguments on this issue are compared with those of the Government, Judge Anderson holds the prevailing views.

III. CONCLUSION

Appellant fully appreciates that his appeal stands before this Court with the doubly vexatious problems of having been unsuccessful in the District Court below and having the formal opposition of the United States here. Notwithstanding these substantial burdens, Appellant adheres to the view that proposing summary reversal of the judgment below is neither naive nor presumptuous. Circuit Court Judge Anderson's thorough dissent, grounded in the proper application of Section 5 principles to the facts of

this case, has now had added to it the support of this Court's most recent decision in the area, Hampton County. Summary reversal is, under the circumstances, warranted. Naturally, if Appellant fails to persuade this Court that summary reversal is the proper disposition, he urges that the Court note probable jurisdiction to allow plenary review.

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CERTIFICATE OF SERVICE

I, JOHN R. MYER, counsel of record for Appellant and a member of the Bar of this Court, do hereby certify that, in accordance with Rule 28, I have served three (3) copies of the foregoing on

Jesse W. Walters, Esq.,
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Counsel for Appellees

and

Honorable Rex E. Lee
Solicitor General
Department of Justice
Washington, D. C. 20530

by depositing same in the United States mail, first class postage prepaid and addressed as above.

This 18th day of March, 1985.

S/JOHN R. MYER

JOHN R. MYER